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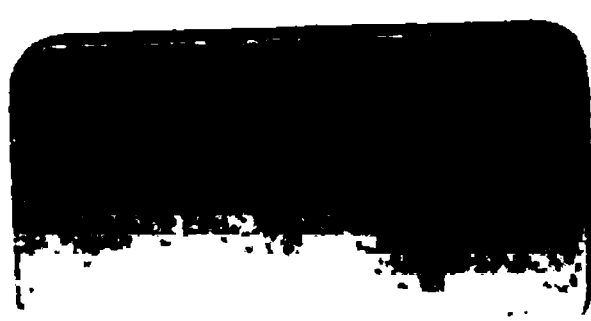
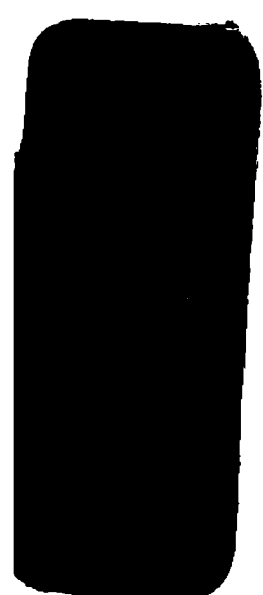
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**A TREATISE
ON THE LAW OF PRINCIPAL AND AGENT, CHIEFLY
WITH REFERENCE TO MERCANTILE TRANSACTIONS**

**by
WILLIAM PALEY**

3d edition with considerable additions

**by
J. H. Lloyd**

**3d American edition with further extensive
additions**

**by
John A. Dunlap**

**NEW YORK, BANK, GOULD & CO.;
ALBANY, GOULD, BANKS & GOULD,
1847**

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TO

THE SECOND EDITION.

THE scarcity of the First Edition of this Work, coupled with the high estimation in which it is held by the Profession in general, induced the present Editor to undertake the task of preparing a new Edition. The additional matter, consisting chiefly of those decisions upon the Law of Principal and Agent which have taken place since the publication of the First Edition, is either placed between *crotchets*, or referred to by *figures*; and those decisions the Editor has endeavored so to classify and arrange, that they should be incorporated under the several titles to which they respectively and peculiarly belong. The Editor, however, has to apologize for having given the case of "*Baring v. Corrie*" in the form of an Appendix: but this he was obliged to do from the circumstance of that case not having appeared in print until long after the greater part of the present Work was sent to the press.

*Brick Court, Temple,
February, 1819.*

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PREFACE.

THE Law of Principal and Agent appears at first view to be founded upon principles so few and simple, and in general so easy of application, that a treatise upon such a subject may seem altogether superfluous. And indeed the decisions upon this branch of the law, which are to be met with in the older Reports, are neither numerous nor important. But the vast extension of modern commerce, both foreign and domestic, the novelty and variety of the channels through which it is carried on, and perhaps also a different system of transacting mercantile business, have given rise to new situations and questions upon the subject of commercial Agency, which have come under legal investigation. To collect and exhibit under one view the decisions which have taken place upon these questions, may perhaps be found of some use; and the rather, as they are most frequently such as arise in the course of trials at Nisi Prius, where a reference cannot conveniently be made to scattered authorities: a consideration which may furnish an apology for presenting the following Treatise to the Public.

It will be seen that it is not within the plan of the present Work to comprise every branch of the extensive relation which subsists between all employers and their representatives. The consequences of that relation, as they chiefly concern mercantile affairs, are the professed objects which the Author has had in view; though, for the sake of illustration or uniformity, he has occasionally introduced matters which do not properly fall under that description.

The Law of Master and Servant indeed, though a dis-

tinct subject from the present, and one which it was far from the Author's intention to treat of at large, is yet so intimately connected with that of Principal and Agent, of which it is the foundation, that perhaps a greater portion of it may be found in the following pages, than seems to belong strictly to a Work of this nature. It is hoped, however, that wherever this branch of the law is referred to, the reference will be found conducive to the solution of questions arising out of the proper subject of the Work.

Essex Court, Temple,
Jan. 4, 1811.

TO

THE RIGHT HONORABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE OF ENGLAND, &c. &c.

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CONTENTS.

CHAPTER I.

PART I.

DUTIES AND RESPONSIBILITIES OF AGENTS IN REGARD TO PRINCIPALS.

Section.

1. Relation of Principal and Agent.
- 2, 3. Duty and Responsibility of Agents generally.
- 4, 5. Duty and Responsibility of particular Descriptions of Agents.
- 6, 7. Duty and Responsibility in Contracts of Sale and Purchase.
8. Liability to Principal for Payment, and herein of *del credere* Commissions.
9. Duty in keeping and rendering Account.

PART II.

REMEDIES OF PRINCIPALS TO ENFORCE THOSE DUTIES.

1. By Action on Contract, the different kinds of.
2. By Action of Tort.
3. By proceeding for the specific Property or Value thereof.
4. Remedy in case of Bankruptcy or death of Agent.

CHAPTER II.

THE RIGHTS OF AGENTS WITH REFERENCE TO THEIR PRINCIPALS.

1. Commission.
2. Advances and Disbursements.
3. Of an Agent's Lien.

CHAPTER III.

OF THE OBLIGATION OF PRINCIPALS TOWARDS THIRD PERSONS ARISING FROM THE ACTS OF THEIR AGENTS.

PART I.

OF THE AUTHORITY OF AGENTS.

1. Express Authority by Writing, Deed, &c. Parol.
2. Implied Authority, doctrine and consequences of.

Section.

3. Of the Execution of the Authority, as to Person, Manner, Form.
4. Determination of Authority by Revocation, Death, &c.
5. Extent and Construction of Authority, and herein of General and Special Agents.
6. Of the general Power of Agents to dispose of or bind Goods, and herein of the Factor's Act.
7. When joint Employment of one Agent makes the Employers jointly liable.
8. How the Obligation of the Principal may be discharged.

PART II.

EFFECTS OF AGENT'S ACTS AS AFFECTING PRINCIPAL.

1. Effect of the Representations of Agents, as binding on the Principal, and of Warranty by Agent.
2. Effect of Notice to Agents, as affecting the Principal with Knowledge.
3. Effect of Admissions and Declarations of Agents, as Proof of particular Facts.
4. Effect of Payment to, and Receipts by, Agents generally.
5. Effect of Payment to Factor.
6. Effect of Discharge, Release, or Composition by Agent.
7. Effect of Delivery to an Agent to charge the Principal.

PART III.

LIABILITY FOR MISCONDUCT OF AGENT.

1. For Neglect or Fraud of Agent.
2. For tortious Conversion or Trespass of Servant or Agent.

PART IV.

ACTIONS AGAINST PRINCIPALS BY THIRD PERSONS.

1. Pleadings in.
2. Proof of Authority.
3. What Authority constitutes an Agent within the Statute of Frauds.
4. Evidence of Contracts made by Agents.
5. Agent's Evidence.

CHAPTER IV.

RIGHTS ACQUIRED BY PRINCIPALS FROM THE ACTS OF THEIR AGENTS.

1. Of Principal's Right to enforce Payment on Contracts, and herein of the Right of Debtor to set off Debts due from Agent to himself.

Section.

- 2, 3. Of Principal's Right to recover Money or Goods wrongfully transferred by Agent.
4. What Acts of Agent generally enure to the Benefit of Principal.
5. What delivery of Goods to Agent vests the Possession in Principal, so as to bar the Owner's Right to stop in *transitu*.
6. When Principal may have the Benefit of Agent's testimony.

CHAPTER V.

PERSONAL RIGHTS OF AGENTS AGAINST THIRD PERSONS.

1. Action by Agent in his own name.
2. Remedies for his own Indemnity, and herein of his Right to enforce Payment to himself in opposition to Principal.

CHAPTER VI.

PERSONAL LIABILITY OF AGENTS TO THIRD PERSONS.

1. Where personally liable on their Contracts.
2. Liability for Torts committed by Authority and Direction of their Employers.

LIST OF CASES.

A		
AARINGTON v Orme	276	Barker v Braham 401
Addison v Gandasequi, 247, 248, 249		Barker v Macrae 359
African Company v Mason 68, 70		Barker v Parker 71
Aiken, Ex parte 88		†Barrett v Jones 384
Aiken v Mackreth 343		†Bartlett v Pentland 283, 285
†Alexander v Alexander 180		Barton v Saddocks 26, 27
Alexander v Gibson 198, 210, 256		Barton v Webb 69
†Alexander v Southey 400		†Barton v Williams 220
Allen v Dundas 393		Bartram v Farebrother 346
Alwin v Taylor 401		†Bates v Pilling 306, 401
†Amory v Meryweather 121		Bauerman v Radenius 258, 271
Ancher v Bank of England 336		Bayley v Morley 329
Anderson v Sanderson 164, 267		†Baynes v Fry 107
Andrew v Robinson 40, 66		†Beauchamp v Parry 233
Appleton v Binks 382		Beaumont v Boulton, 50, 51, 115, 292
Ardglasse (Earl of) v Muschamp, 325		†Bell v Bell 261
Arlington (Lord) v Merrick 70		Bell v Catesbie 397
†Armistead, Ex parte 93		Bell, Ex parte 120
Arnold v Webb 56		Bell v Gilson 22
†Ashley v Baillie 264		Bell v Jutting 151
Atkyn v Amber 365		Bell v Kymer 373
Attorney General v Gower 264		Bellairs v Ebsworth 72
†Attorney General v Lord Dudley, 35		Benjamin v Porteus 359
†Attwood v Munnings 196		†Bennett, Ex parte 35
Aubert v Maize 64, 120		†Bennett v Spackman 122
		†Bensley v Bignold 64
		†Benson v Hoppins 382
		Bent v Puller 89
		†Berkeley v Hardy 158
		Bexwell v Christie 8, 26
		†Bickerton v Burrell 363
		Biggs v Lawrence 268, 271
		Billon v Hyde 173
		Bird v Thompson 322
		Birt v Kershaw 320
		†Bishop v Crawshaw 126
		†Bize v Dickason 111
		Blackburn v Scholes 280
		Blagden v Bradbear 314
		†Blandy v Allen 222, 232
		Blore v Sutton 171, 176
B		
Bach v Proctor 73		
Bacon v Dubary 183, 383		
†Bage, Ex parte 35		
Bailey v De Walkiers, 191		
Baker v Langhorn 111		
Bamfill v Leigh 292		
†Barber v Gingell 169		
Barclay v Cousins 138		
Barclay v Lucas 71		
Baring v Corrie 13, 279, 288, 331		

[illegible]

LIST OF CASES:

xix

D

D'Abridgecourt v Ashley	180, 181
Dale v Sollett	62, 126
↓ Dalton v Irvin	106
Dalzel v Mair	254, 336
Dance v Girdler	72
Daniel v Adams	208
↓ Daniel, Ex parte	64
D'Aquila v Lambert	144
↓ Dartnall v Howard	7, 78
Daubigny v Duval	142, 213, 216
Davis v Bowsher	94, 131
Dawson v Atty	261
Dawson v Dawson	52
↓ Dawson v Morgan	321
De Bouchett v Goldsmid	213, 218
↓ De Gaillon v Le Aigle	373
De Gelder v Savory	371
Delany v Stodart	18, 19, 20
↓ De Mantort v Saunders	328
Deeze, Ex parte	127, 130
Denew v Daverell	105
Dent v Dunn	290
De Vignier v Sanson	22
Dick v Lumsden	239, 241
Dickinson v Lilwall	189, 315
Dinwiddie v Bailey	126
Diplock v Blackburn	49
Dixon v Baldwin	354, 357
↓ Dixon v Bloomfield	33
↓ Dixon v Bromfield	33
Dixon v Cooper	358
Dixon v Ewart	188
↓ Dixon v Hamond	54
Dodridge v Anthony	26
Doe v Chaplin	345
Doe v Martin	265
↓ Doe v Summersett	190
↓ Doe v Walters	190
↓ Doubleday v Muskett	376
↓ Dougal v Kemble	373
↓ Down v Halling	238
↓ Downes v Grazebrook	35
↓ Downes v Power	264
↓ Drake v Marryatt	266, 273
Drinkwater v Goodwin,	129, 134, 135
	287, 365
↓ Dubois v Ludert	328
↓ Ducarrey v Gill	197
↓ Duclos v Ryland	220, 221
Dufresne v Hutchinson	80, 342
Dumas, Ex parte	83, 88, 90
↓ Dunbar v Tredennick	35
Dunbar v Wilson	15
↓ Dyer v Pearson	169, 211
Dyster, Ex parte	15

E

East India Company v Henchman,	38
East India Company v Henley,	209
+Eaton v Bell	376, 379
Edgar v Fowler	65
Edmiston v Wright	1, 109
+Edmunds v Lowe	321
Edwards v Footner	262
Edwards v Hodding	392
Edwards v Minet	152
Egles v Vale	60
Eicke v Meyer	101
Ekins v Maclish	198
Elliott v Davis	157
Ellis v Hunt	348, 357
Elsee v Gatward	77
Emerson v Blonden	2
Emmerson v Heelis	160, 314
Escot v Milward	285, 330
+Evans v Trueman	229
Evans v Williams	321
Everett v Collins	251, 252

F

Faikney v Reynous	118, 119, 120
†Fairbrother v Prattent	160
Fairlie v Hastings	269, 273
Farebrother v Ansley	153
†Farebrother v Simmons	160
Farmer v Robinson	185
Farmer v Russell	63, 64
†Faulkner v O'Brien	11
Favenc v Bennett	278, 279
Feize v Wray	144
Fenn v Harrison, 172, 197, 204,	209
Fenton v Browne	276
†Ferguson v Carrington	174
Field v Todd	152
Fillis v Bruton	260
Filmer v Delber	291
Fitch v Sutton	292
Fitchett v Adams	345
Fitzherbert v Mather	258
†Fletcher v Heath	231
†Fletcher v Walker	47, 48
Flint v Le Mesurier	100, 138
Ford v Hopkins	238
Foster v Alanson	60, 67
Foster v Clements	44
†Foster v Frampton	356
Forsyth v Milne	164
Fowler v M'Taggart	348, 354
Foy v Bell	254
†Freeland v Glover	261
French v Backhouse	109
†Frietas v Dias Santos	59

Frontin v Small

183

H

G

†Gale v Reed 69
 †Gale v Wills 315
 †Gardner v Baillie 178, 192
 Garratt v Cullum 85, 87
 †Garth v Howard 273
 George v Clagett 329
 Gerard v Baker 274
 Gevers v Mainwaring 7, 320
 Gibson v Jeyes 11
 †Gibson v Minett 395
 Giles v Perkins 88, 91, 131
 †Giles v Thompson 93
 †Gill v Cubitt 238
 †Gill v Kymer 220
 †Gilman v Robinson 163
 Glynn v Baker 220, 234, 238
 Godfrey v Furzo 83
 Godfrey v Saunders 53, 55
 Godin v London Assurance
 Company 130, 138
 Goldschmidt v Lyon 114
 Goldsmid v Gaden 233, 234
 Goodhaylie's case 368
 Goodland v Blewith 289
 Goodson v Brooke 192
 †Goodtitle v Woodward 190, 191
 Goodwin v Gibbons 401
 †Goom v Afflalo 316
 Goore v Daubeny 53
 †Gorgier v Mievill 236
 †Goring v Edmond 73
 Goswell v Dunkley 17
 Goupy v Harden 43, 381
 Graham's (Lady) case 2
 Graham v Stamper 371
 Grant v Austin 395
 †Grant v Fletcher 316
 †Grant v Vaughan 234
 †Gregory v Gregory 35
 †Gregory v Parker 267
 Green v Farmer 127
 Green v N. R. Company 7, 322
 †Green v Weaver 73
 †Greenland v Dyer 121
 Greenway v Hurd 391
 Grove v Dubois 40, 111, 324
 †Guerreiro v Peile 25, 213
 †Guichard v Morgan 220
 Gunnis v Erhart 257
 Gurney v Sharpe 113, 134
 †Guthrie v Armstrong 178

†Hagerdorn v Oliverson 324
 Haille v Smith 139
 Haines v Busk 104, 106
 Haines v French 378
 †Hall v Hallett 11
 †Hammersley v Purling 122
 †Hamond v Holiday 105
 Hammond v Ward 58
 Hammonds v Barclay 140
 Hanson v Roberdeau 373
 Hardacre v Stewart 392
 Harding v Carter 19, 23, 273
 Hardwicke (Lord) v Vernon, 37, 47, 52, 96
 †Harrington v Hoggart 51
 Harman v Lasbrey 321
 †Harris, Ex parte 35
 Harris v Tremenhare 12
 Harrison v Jackson 157
 †Harrison ——— v 170, 188
 †Hart v White 384
 †Hartley v Hitchcock 147
 Hartop, Ex parte 369
 †Hartop v Jukes 384
 Hartup v Wardlow 57
 Hassell v Long 70
 †Hastelow v Jackson 67
 Hatch v Hatch 11
 †Hawes v Watson 81
 Hay v Goldsmid 192
 †Haywood v Rogers 261
 Hazard v Treadwell 163, 188
 Helmsley v Loader 308
 Helyear v Hawke 210, 257
 Hen v Caisby 274
 †Henderson v Barnwall 171, 176
 Hereford v Powell 129
 Hern v Nichols 303
 Heyman v Neale 315
 Heys v Hesceltine 308
 Hicks v Hankin 211, 315
 †Hill v Farnell 126
 Hinde v Whitehouse 314, 315
 Hoare v Dawes 242
 Hockendon, Ex parte 128
 †Hodgson, Ex parte 35
 Hodgson v Loy 350
 Hogg v Snaith 192
 †Holland v Hall 104
 Hollingworth v Tooke 86
 Holroyd v Whitehead 125
 Horn v Baker 84
 †Hornblower v Proud 92
 †Horsfall v Fauntleroy 250, 317
 †Horsfall v Handley 390
 Horsley v Bell 375
 Horsley v Rush 158

LIST OF CASES.

xxi

†Hoskins v Slayton	388
Houghton v Ewbank	169, 311
Houghton v Matthews, 26,	112, 132, 136, 212
Houston v Bordenave	114
Houston v Robertson	114
Hovey v Blakeman	105
Hovil v Pack	130, 175
Howard v Bailey	172, 179, 192
Howard v Braithwaite	257, 315
Howard v Christie	9
†Howard v Tucker	109
†Hudson v Granger	288, 327
Huguenin v Baseley	11
Hunt v Ward	349, 351
Hunter v Baring	239
Hunter v Prinsep	174
Hunter v Welch	40
†Harry v Rickman	295
Hurst v Holding	105
Hussey v Christie	133

I, J

Iderton v Atkinson	320, 321
†Inglin, Ex parte	94
†Iveson v Conington	384
Jacob v Allen	393
†Jackson v Clarke	150, 220
James, Ex parte	35
Jansen v Green	13
Jaques v Golightly	338
†Jenkins v Gould	11
Jennings v Moor	263
Johnson v Mason	309
†Jolland <i>ats</i> ———	49
Jones v Brooke	320
†Jones v Davids	37
Jones v Edney	257
†Jones, Ex parte	107
Jones v Perchard	300, 318
†Jones v Tripp	11
Jones v Williams	69
Josephs v Knox	364
†Josephs v Pebrer	102, 116
†Jourdain v Lefevre	94

K

Kahl v Jansen	271
†Kain v Old	257
Kea v Gordon	58
Kemble v Atkins	15
Kemp v Prior	30, 31
Kendall v Andrews	246
†Kendray v Hodgson	384
†Kennedy v Gouveia	381

†Kenney v Brown	11
†Kenworthy v Scholfield	314
Kemeys v Proctor	160, 314
†Kidson v Dilworth	379
Kilgour v Finlayson	169, 192
Kinloch v Craig	138
Kinnitz v Surry	171
†Kirby v Smith	261
Kirkman v Shawcross	127, 128
Knight v Lord Plymouth	45
†Koster v Eason	113
Kruger v Wilcox	128
†Kuckein v Wilson	220
Kymer v. Suercropp	244, 246

L

Lacey, Ex parte	35
L'Apostre v Plaistrier	83
†Laing v Smyth	91, 235
†Lanchester v Frewer	376
†Lanchester v. Tricker	376
Lane v Cotton	300
Langhorn v Allnutt	270, 271
Langston v Boylston	151
†Langton v Hughes	121
Lanyon v Blanchard	149
†Laugher v Pointer	298
†Leadbitter v Farrow	379
†Leadley v Evans	70, 72
Le Cras v Hughes	100
Lee v Zagury	339
Leeds Bank, Ex parte	91, 93
Leeds v Wright	351
Le Fevre v Lloyd	43, 380
Le Neve v Le Neve	266
Lepard v Vernon	187
Leslie v Pounds	296
Levi v Barnes	101
†Levy v Barnard	147
Levy v Wilson	308
Lewson v Kirk	7, 24
†Lincoln Assurance Company v Buckle	73
Lincoln v Topliff	61
Liverpool W. W. Company v Atkinson	69, 70
London (The Lord Mayor of) v Brandon	15
Lowndes v Anderson	234
Lowther v Lowther	33, 34, 37
†Lloyd v Sigourney	237
Lucas v Dorien	131
Lucas v Groning	43
Lucena v Crawford	23
Lupton v White	48
†Lynch v Hamilton	261

M			
Maans v Henderson	148, 331	Morse v Royal	34, 85
Mace v Cadell	83	Morse v Slue	398
M'Beath v Haldimand	377	Muffatt v Parsons	289
M'Brain v Fortune	359	†Mulvaney v Dillon	35
M'Combie v Davis	79, 145, 214 216, 217, 342	†Murray v East India Company,	192
†MacKenzie v Johnston	59	Murray, Ex parte	87
M'Kenzie v Scott	42	Myers v Edge	72
†Maclean v Dunn	171	Myriel v Hymondsold	375
†M'Manus v Crickett	299		
Maesters v Abram	270, 272, 318	N	
†Mainwaring v Brandon	32	Nares v Rowles	73
Mallough v Barber	18	†Naylor v Winch	36
Maltby v. Christie	16	Neale v Erving	311
Man v Shiffner	129, 145, 149, 217	†Newberry v Colvin	299
Mann v Forrester	58, 151, 285	Newman v Payne	11
Marsack, Doe ex dem. v Reed	190	Newson v Thornton	214, 215, 239, 341
Marsh and Astrey's case	397	†Nichols v Clent	140
†Marsh v Pedder	251, 252	Nicholson v Mounsay	300
Marten v Horrell	359	Nickleson v Croft	308, 309, 311
Martin v Crump	53, 96	Nickson v Brohan	205
Martini v Coles	213, 216, 221	†Nix v Olive	241
Martyn v Blithman	153	Norfolk (Duke of) v Worthy	335
†Marzetti v Williams and others	74	†Norfolk, Ex parte	328
Mason v Hodgson	358	Norris v Le Neve	264
†Mason v Joseph	176	North's (Lord) case	5
†Massey v Banner	10, 47, 48	†Norton v Heron	384
Massey v Davies	37, 38, 51		
†Masterman v Cowrie	107	O	
Mather, Ex parte	118, 119, 120	Ockenden, Ex parte	130
Mathews v Haydon	295, 318	Ogilvie v Foljambe	257
Mathews v Walwyn	52	Ogle v Atkinson	354
Mavor v Simeon	254	Olive v Eames	268
Mellish v Bell	22	†Olive v Smith	136
Merryweather v Nixan	152	†Oliver v Court	37
Metcalf v Bruin	72	Ormond (Lady) v Hutchinson	48
Michael v Allestree	295, 399	Oursell, Ex parte	85, 88, 89
Middleton v Fowler	298	Owen v Barrow	276
Miller v Aris	394	Owen v Gooch	370
Miller v Falconer	7, 322	†Owenson v Morse	147
†Miller v Race	234		
Mills v. Ball	350	P	
Minett v Forrester	114	Palethorp v Furnish	2, 267
Mires v Solebay	400	Panton v Panton	48
Mitchell v Cockburne	120	Park v Hammond	18
†Mole v Smith	291	Parker v Carter	130
Montague v Tedcombe	73	Parker v Kett	181
†Montesquieu v Sandys	12	Parker v Smith	114
†Monk v Whittenbury	279	Parnther v Gaitskell	284
Moore v Clementson	331	†Parr, Ex parte	94
Moore v Morgue	9, 22	Parsons, Ex parte	46, 76
Morgan v Corder	372	Patterson v Gandasequi,	247, 249, 334, 373
†Morgan, Ex parte	35		
Morgan v Lewes	48		
Morris v Cleasby	111, 112, 113, 286		
†Morris v Stacey	382		
†Morland, Ex parte	35		

xxiii

Paterson v Tash	213	+ Roberts v Ogilby	54
Paul v Birch	241	Robertson v Kensington	233
Peacock v Rhodes	233, 234	+ Robinson v Read	251, 252
Pearce v Rogers	164	Roe v Davies	347
Pearsall v Somerset	70	+ Roe v Pierce	190
Pease, Ex parte	91, 93, 94	Rogers v Boehm	50, 62
+ Pease v Hirst	72	Rogers v Kelly	44
+ Peele v Northcote	114	Rowe v Pickford	355
Peel v. Tatlock	73	Rowning v Goodchild	398
+ Peppin v Cooper	70	Routh v Thompson	324
Perkins v Smith	400	Rucker v Cammeyer	315
Petrie v Hannay	117, 118, 119, 120	Rucker v Fromont	309
Peto v Hague	256	Runquist v Ditchell	25, 198, 210
Petties v Soame	201, 207	Rusby v Scarlett	167
Pickering v Busk	169, 213	Rushforth v Hadfield	128
+ Pickering v Dowson	257	+ Russell v Bangley	282, 283
Pinckney v Hall	242	Russell v Hankey	9, 45, 76
Pinto v Santos	49	Russell v Palmer	4, 5
+ Pitcher v Rigby	11	Ryall v Rolls	83, 87, 95
Pitt v Yalden	9		
+ Polhill v Walter	387		S
+ Pond v Underwood	393		
Poulter v Cornwall	57		
Powell v Divett	317	Sadock v Burton	27
Powell v Edmonds	257	Sadler v Evans	389, 390, 391
Powell v Sadler	80	Sadler v Leigh	361
+ Power v Butcher	114, 336	Salt v Field	128
Precious v Able	243	Sams v Dangerfield	70
+ Prince v Clarke	4, 31, 115	+ Sanderson v Gregg	126
Proof v Hines	12	+ Sandilands v Marsh	201
+ Pryce v Wilkinson	101	Sargeant, Ex parte	93
Pulteney v Kymer	217	+ Sanders and Archer's case	306
		+ Saunders v Tayler	70, 72
		Sayer, Ex parte	95
		Schmalings v Thomlinson,	49, 150, 177
		Scholey v Gambier	358
		Scott v Franklin	94, 131
		+ Scott v Irving	284
		Scott v M'Intosh	56
		Scott v Pettit	350, 352
		+ Scott v Porcher	395
		Scott v Surman,	26, 60, 61, 86, 90
		Seaman v Fonnereau	258, 260
		Seignior v Walmer	323
		Seller v Work	19
		+ Selsey (Lord) v Rhodes	36
		Scrimshire v Alderton	87, 285
		+ Serra v Wright	69
		Seton v Slade	189, 208
		Severin v Keppel	79
		Seymour v Pychlan	247
		+ Shaw v Hervey	85, 123
		Shee v Clarkson	114
		Shelborne v Inchiquin	266
		+ Sheldon v Cox	264
		Shepherd v Maidstone	52, 68
		Shiels v Blackburn	4, 6, 76, 78
		Shipley v Kymer	215

†Shirley v Wilkinson	261	Stubbing v Heintz	165, 2
Shum v Farringdon	69	Sullivan v Greaves	
†Siffkin v Wray	144, 346	Sweet v Pym	1
†Sigourney v Loyd	237, 336	Syeds v Hay	
Simon v Motivos	313		
†Simpson v Cooke	72		
Simpson v Swan	43		
†Slater v West	238		
Smith v Bromley	66, 67, 391	Talbot v Godbolt	3
Smith v Cadogan	9, 21	Tamplin v Diggins	1
†Smith v Ferrand	251	†Tapley v Martens	2
Smith v Goss	350	Tate v Hilbert	1
Smith v Hodgson	173	Taylor v Brewer	1
Smith v Lascelles	18	Taylor v Haylin	
Smith v Mercer	44	†Taylor v Kymer	2
Smith v Oxenden	24, 107	Taylor v Lindie	62.
Smith v Plummer	133	Taylor v Plumer	63, 67, 3
†Smith v Young	79	†Taylor v Robinson	1
Snee v Prescott	144, 318	†Taylor v Trueman	229, 2
Snook v Davidson	149	Tenant v Elliott	
†Snow v Peacock	238	Theobald v Tregott	3
Snowdon v Davies	390, 391	Thetford's (Mayor of) case	1
†Soames v Spencer	171	†Thompson v Davenport	248, 2
Sollers, Ex parte	93		3
Solly v Rathbone, 150, 177, 215,	217	†Thompson, Ex parte	
		†Thompson v Farmer	2
Solomons v The Bank of England,	234, 238, 363	†Thompson v Giles	88, 1
		†Thompson v Havelock	1
Solomons v Dawes	345, 347	Thompson v Lambe	
†Southcote's case	16	†Thompson v Pearce	3
Southern v How	152, 302	Thornicroft v Barnes	
Southwark, St. Savior's v Bostock,	70	Thornton v Kempster	2
		Thorald v Smith, 171, 205, 211,	2
†Sowerby v Brooks	122, 125	Thorp v How	3
Sparke v Richards	57	†Tikel v Short	
†Spencer v Spencer	59	†Todd v Reid	2
†Spittal v Lavender	385	†Todd v Robinson	1
†Sponge, Ex parte	36	Tompkins v Barnett	66,
Speering v Degrave	244	Tomkins v Wiltshire	
Spurraway v Rogers	57	Tooke v Hollingworth	
Stackpole v Earl	102	Topham v Braddick	47, 48,
Stansfield v Johnson	314	Toulmin v Steere	2
Staplefield v Yewd	389	†Towgood, Ex parte	
Steers v Lashley	117, 119, 120	Townend v Downing	2
Steiglitz v Egginton	158	Townsend v Inglis	169, 2
†Steirnel v Holden	220, 342	Townson v Wilson	2
Stevens v Elwall	400	Trent Navigation Company v H	
Stevenson v Mortimer	337	ley,	
Stewart v Fry	395	Treuttell v Barandon	237, 2
†Stewart v Kable	101	Turner v Crookshank	81, 2
Stokes v Le Riviere	348, 352		
†Stonard v Dunkin	81		
Stone v Cartwright	402		
Stowell's case	165		
†Strace v Whittington	384		
Stracy v Decy	327		
Strange v Leo	71		
†Strange v Wigney	238		
†Strong v Hart	251		

T.

U

V		Whitfield v Lord Le Despencer	300
‡Vanderzee v Willis		Whitlock v Waltham	275
Varden v Parker	40	Wichcote v Lawrence	34
Vere v Smith	15	‡Wilcock v Nicholls	69
Vernon v Hankey	121, 145	Wilks v Bach	182
Vernon v Hanson	122	Wilkes v Ellis	13
‡Vullamy v Noble	93, 95	Wilkins v Casey	122
W		Wilkins v Carmichael	127
Wakefield Bank, Ex parte The,		Wilkin v Wilkin	57, 58
	91, 93	Wilkinson v Coverdale	19, 76
Wallace v Telfair	18	Wilkinson v Kitchen	66
‡Wallace v Woodgate	147	‡Wilkinson v Johnson	44
Walker v Birch	136, 142, 147	‡Willes v Glover	261
Walker v Constable	314	‡Williams v Barton	220, 221
Walkington v Barnardiston	133	Williams v Everett	395
Walmesley v Booth	11	Williams v Millington	362
Walsh v Whitcombe	184, 185	‡Williams v Pigott	11
Ward v Evans	171, 206, 291	Williams v Walsby	158
Waring v Cox	364	‡Wilson v Anderton	81, 347
‡Waring, Ex parte	94	Wilson v Creighton	111, 114
Waring v Favenc	245, 246, 334	Wilson v Cornwall	31, 32, 115
Warwick v Noakes	9, 46	Wilson v Hart	247
Warwick v Slade	185	Wilson v Kymer	374
‡Waters v Brogden	207	Wilson v Poulter	173, 324
‡Watkins v Hewlett	394	Wiltshire v Sims	26, 213
‡Watkins v Vince	170	‡Winch v Fenn	107
Watson v King	186	Winchester (Bishop of) v Knight,	96
‡Watson v Toone	35	Winter v Mair	107
‡Watt v Grove	35	‡Withington v Herring	197
Waugh v Carver	53	Wolfe v Horncastle	108
Webb v Brooke	120	‡Wood v Downes	11
Webster v De Tastet	8, 20	‡Woodlif's case	16
‡Webster v Foster	261	‡Woodhouse v Meredith	97
‡Wedlake v Hurley	395	‡Wookey v Pole	234
‡Weinholt v Roberts	111	Wostenholme v Davies	275
‡Weldon v Gould	136	Wren v Kirton	34, 37, 47, 48
Wells v Middleton	11	Wright v Campbell	239
Wells v Ross	53	Wright v Dannah	33, 160
Weston v Barton	72	Wright v Hunter	62
Westwood v Bell	151	Wright v Russell	71
Weyland v Elkins	297	Wright v Proud	11
Weyland's (Sir Robert) case	166	Wyatt v Marquis of Hertford	253
Weymouth v Boyer	79, 132, 142	Wynne v Ryder	399
‡Whatton v Toone	35	Y	
Whitcomb v Jacob	90, 95, 96	‡Yates v Bell	395
‡Whitcomb v Minchin	37	Yates v Freckleton	277
White v Baring	133	Yarborough v The Bank of England,	310
‡White v Chapman	105	Youl v Harbottle	80
White v Lady Lincoln	48, 104	Z	
White v Proctor	314	Zinck v Walker	
‡Whitebread v Brooksbank	391	86, 88	
Whitehead v Tucket,	2, 169, 199, 200, 211		
Whitehead v Vaughan	130, 146		

11

LIST OF ADDITIONAL CASES

REFERRED TO IN

THE AMERICAN EDITION.

A			
Abbott v Sebor	319	Arrott v Brown	39
Adams v Lindsell	185	Arthur v Barton	170
Adams v Oakes	361	Arthur v Schooner Cassius	4
Adams v Whittlesey	377	Astor v Union Insurance Company	5
Adamsou v Jarvis	152, 153	Astor v Wells	262
Adsit v Brady	398	Atkinson v Manks	10
Akerman v Humphery	239	Attorney General v Aspinall	10
Alcey v Hotson	187	Attorney General v Hotham	10
Alexander, Ex parte	36	Attorney General v Life & Fire Insurance Company	155, 202
Allaire v Ouland	153	Attorney General v Pargeter	263
Allen v Coit	262, 319	Attorney General v Wilson	152
Allen v M'Keen	389	Auburn Academy v Strong	175
Allen v Ogden	202	Augusta, Bank of v Earle	64
Allen v Waldgrave	378	Auriol v Thomas	107
American Fur Company v United States	256	Avery v Halsey	153
American Ins. Company v Coster	170	B	
American Insurance Company v Oakley	155	Bach v Proctor	69
Amory v Hamilton	6, 172, 176	Bailey v Adams	147
Amos v Temperly	371, 374	Bailey v Mayor, &c. of New York,	300
Anderson v Clark	364	Baker v Whiting	33, 34, 52
Anderson v Cronley	2, 200, 202	Baldney v Ritchie	329
Anderson v Jenkins	157	Baldwin v Mildeberger	358
Anderson v Thornton	70	Ball v Dunsterville	157
Andrew v Dieterich	212	Ball v Harris	179
Andrews v Kneeland, 25, 197, 202,	209	Baltimore Turnpike	177, 178
Angero v Keen	70	Barnford v Shuttleworth	391
Anonymous	132, 290	Banergee v Hovey	3, 157, 201
Anthony v Butler	155, 157	Banfil v Leigh	361
Arbounin v Anderson	239	Baptist Church of Ithica v Bigelow	315
Arden v Patterson	36	Barber v Brace	198, 257
Arfridson v Ladd	181, 370	Barker v Marine Insurance Company	33
Armstrong v Garrow	300	Barker v Mechanics Fire Insurance Company	155, 381
Armstrong v Gilchrist	171, 172	Baring v Clark	271
Armstrong v Toler, 63, 64, 116, 120		Baring v Corrie	334
Arnold v Clifford	152, 153		
Arnold v Poole, Mayor, &c. of,	155		

Barker v Havens	374	Blagge v Miles	1
Barnett v Brandao	129	Blanchard v Russell	1
Barnes v Cole	360	Bleaden v Hancock	15
Barron v Fitzgerald	197	Blood v Goodrich	157, 158, 2
Barrow v Rhinelanders	12, 52	Blow v Russell	2
Bartholomew v Leach	33	Bogart v De Bussy	11
Bartlett v Purnell	315	Boggs v Lancaster Bank	156, 2
Bartlett v Viner	64		2
Bates v Keith Iron Company	155	Bolin v Huffnagle	3
Batty v Carswell	202	Bonsfield v Creswell	2
Bawden v Howell	361	Bonzi v Stewart	62, 213, 2
Bawtree v Watson	132	Boone v Chiles	2
Bay v Coddington	233	Boorman v Brown	
Baynes v Fry	107	Booth v Barnum	2
Beach v Vandenburg	109	Booth v Mister	2
Beadles v Bunk	38	Bottomley v Forbes	
Beals v Allen	202	Botts v Cozine	1
Beardsley v Root	291	Bowen v Fox	1
Bedford Commercial Insurance		Bowman v Watken	2
Company v Covell	378	Bowman v Rainteaux	
Beebe v Robert	247, 361, 368	Boyson v Coles	2
Belknap v Reinhart	378	Bozon v Bolland	1
Bell v Auldjo	111, 192	Bracken v Miller	262, 2
Bell v Cunningham	31, 75, 171, 172	Bradford v Kimberley	105, 1
Bell v Humphreys	109	Bradlee v Boston Glass Manu-	
Bellows v Hallowell and Augusta		factory	155, 181, 3
Bank	156	Bradley v Carr	396, 3
Bend v Hoyt	378, 389	Bradley v Washington Steam	
Benedict v Smith	31, 172, 174, 192,	Packet Company	2
	324	Bradt v Koon	1
Bennett, Ex parte	33	Bradt v Walton	
Bennett v Johnson	128, 130	Bradshaw v Bennett	2
Bennett v Furnell	234	Brady v Giles	2
Bennett v Moita	301	Bramwell v Lucas	3
Bensley v Bignold	64	Brander v Phillips	3
Benson v Heathorn	4, 10, 36, 37,	Brandao v Barnett	1
	105, 108, 109	Bredin v Dubarry	31, 1
Bentinck v Willink	64	Brenzer v Wightman	5
Bergen v Bennett	178	Brewster v McCardell	1
Berkley v Hardy	181	Bridge v Niagara Insurance	
Berkley v Watling	239	Company	324, 1
Berrien v McLane	2, 11, 256	Brigham v Marean	1
Bertram v Godfrey	4	Brind v Hampshire	
Bertine v Varian	54	Brisban v Boyd	16, 18, 100,
Betham v Benson	256, 268	Bristol v Sprague	
Betteley v Reid	10	Brockway v Allen	
Betts v Gibbins	152, 153	Brooks v Mitchell,	
Bevan v Crooks	96	Brown, Matter of	
Bevan v Waters	127	Brown v Arrott	
Beverley v Lincoln Gas Light &		Brown v Austin	
Coke Company	155	Brown v Duncan	
Bigelow v Heaton	142	Brown v Jackson	237,
Bingham v Allport	290	Brown v Maxwell	
Binns v Pigot	127	Brown v M'Gran	
Birkhead v Brown	234	Brown v Nairne	
Bird v Boulter	160	Brown v Rickets	
Bird v Simmons	317	Brown v Seaton	
Blades v Free	186, 396	Bruce v Wait	
Blake v Nicholson	130	Bruen v Marquand	

Brush v Reeves' Administrators,	234	Chapman v Bukinton	70
Brush v Ware	263	Chapman v Morton	209
Brush v Wilkins	235	Chapman v Partridge	169, 171
Brutton v Burton	158	Chapman v Walton	7, 8
Bryans v Nix	139, 364	Chappedelaine v Dechenaux	52
Bryce v Brooks	129, 142	Cheever v Smith	253
Buchanan v Currie	157	Chenango, Bank of, v Osgood	53
Buckland, Inhabitants of, v Conway	291	Chesapeake Insurance Company v Stark	191
Buckley v Furniss	350	Chesnut Hill Turnpike v Rutter,	155
Buckmaster v Hanop	160	Chesterfield Manufacturing Company v Dehon	95
Buffum v Chadwick	361	Chesterman v Gardner	263
Bugden v Bignold	263	Childs v Monins	381
Bulkley v Dayton	157	Cholmondely v Clinton	53
Bulkley v Derby Fishing Company	155	Church v Imperial Gas Light Coke Company	155
Bull v Bull	178	Church v Marine Insurance Company	33
Bullard v Bell	234	Church v Sterling	33, 37
Bullock v Boyd	52, 107	Citizens Bank v Nantucket Steamboat Company	5, 294, 299
Burdon v Webb	116	City Bank of New York v Barnard	120
Burlingham v Deyer	319	Clagett v Phillips	322
Burnett v Bouch	101	Clark v Baker	271
Barrill v Phillips	27, 127	Clark v Campbell	178
Bussy v Donaldson	296	Clark v Farmers Woolen Manufacturing Company	234, 236
Butler v Emmett	186	Clark v Mayor, &c. of Washington	155, 243
C		Clark v Moody	47, 58, 104
Cady v Shepherd	157, 158	Clark v Richards	2, 5
Cairnes v Bleecker	31, 80, 172	Clark v Van Northwick	27
Caldwell v Leiber	105	Clark's Executors v Van Riemdyck	171
Callaghan v Atlantic Insurance Company	259, 260	Clarke's Lessee v Courtney,	180, 181
Callender v Oelrichs	18	Clarkson v De Peyster	51
Calvert v Gordon	69	Clarkson v Edes	128
Camden v Doremus	5	Clason v Smith	261
Cameron v Irwin	38	Clason's Executors v Bailey	316
Campbell v Pennsylvania Insurance Company	33	Clement v Brush	157
Canal Bank v Bank of Albany	234	Clement v Jones	31, 171
Canal Bridge v Gordon	155	Clinton v Strong	389
Canterbury, Viscount v Attorney General	295, 300	Close v Holmes	223
Capel v Thornton	173, 277	Clutton v Pardon	132
Card v Hope	109	Coates v Bainbridge	273
Carew v Otis	389, 391	Cobb v Abbot	297
Carpenter v American Insurance Company	259	Cobbold v Chilver	192
Carr v Hinchliff	330	Coddington v Bay	234, 239
Carstairs v Stein	107	Codwise v Hacker	171
Carter v Dean, &c. of Ely	155	Coit v American Insurance Company	5
Carter v Palmer	34, 36, 322	Cole v Sacket	253
Case v Abeel	34, 36, 47	Cole v Wade	175
Cassiday v McKenzie	186	Colley v Merrill	108
Catskill, Bank of, v Messenger	53	Collins v Carey	105
Champernown v Scott	132	Colton v Dunham	102, 107
Champlin v Laytin	263		
Chandler v Belden, 5, 140, 147, 239			

Columbia, Bank of, v Patterson's Administrator	155	Daniel v Adams	
Commercial Bank v French	324	D'Arcy v Lyle	108,
Commercial Bank of Buffalo v Kortright	198, 201, 290	Darst v Roth	
Commercial Bank of Lake Erie v Norton	169, 175, 176, 200	Dater v Troy Turnpike Company	
Commonwealth v Griffith	1, 157	Davenport v Sleight	
Commonwealth of Kentucky v Bassford	64	Daubigny v Duval	
Conard v Atlantic Insurance Company	239	Davidson v Stanley	172,
Conroy v Warren	234	Davis v Shields	
Consequa v Fanning	40, 367	Dawes v Jackson	
Cook v Taylor	374	Day v Croft	
Cooper v De Tastet	10	Davoue v Fanning	33, 34
Cooper v Meyer	234	Deau v Hall	
Cooper v Rankin	157	Dean v Hewitt	121,
Copeland v Mercantile Insurance Company, 4, 33, 171, 177, 181	184	Dearle v Hall	
Corlies v Cumming, 40, 127, 212, 253, 285	171, 172	De Begnis v Armistead	
Corning v Southland	319	De Forest v Fulton Fire Insurance Company, 18, 22, 100, 361,	
Cortes v Billings	107	De Forest v Parsons	
Coster v Dilworth	54	De Gaillon v L'Aigle	
Coster v Murray	3, 4	De Gamind v Pigou	
Courcier v Ritter	350	De La Chaumette v Bank of England	239,
Covell v Hitchcock	152, 153	Delius v Cawthorne	
Coventry v Barton	163	De La Viesca v Lubbock	10
Cox v Hoffman	364	Deniston v Cook	
Coxe v Harden	33	Denston v Perkins	
Cram v Mitchell	130	Desborough v Beetham	
Cranston v Philadelphia Insurance Company	10	De Tastet v Crousillat	4, 18
Crawford v Fisher	147	Devinny v Reynolds	
Crawshaw v Homfray	10	Dey v Dunham	
Crawshaw v Thornton	178	De Zeny v Bailey	
Crocker v Crane	178	Dickson v Lodge	
Crofoot v Allen	121	Dinwiddie v Bailey	
Cromwell v Arrott	18	Dixon v Bell	
Crosbie v McDowal	257	Dixon v Hammond	
Crosier v Acer	290	Docker v Somes	50
Crozer v Pilling	234	Dodge v Perkins	39
Cruger v Armstrong	177	Dodge v Tileston	105,
Cull v Backhouse	128	Dodson v Wentworth	
Cumpston v Haigh	171	Doe v Goldwin	
Cushman v Loker	263	Doe v Stacey	
Cuyler v Bradt		Doorman v Jenkins	
		Dougherty v Van Nostrand	
		Douglas v Moody	
		Downing v Rugar	
		Drayton's Executors v Drayton	
		Drew v Bird	
		Drinkwater v Goodwin	
		Dryden v Frost	262,
		Dubois v Delaware &c. Canal Company	
		Dudley v Bolles	
		Dugnall v Wigley	
		Duncan v Lyon	56
		Dunham v Dey	
		Dunham v Gould	
		Dunkin v Vandenberg	
		Dunn v St. Andrew's Church	
D			
Dale v McEvers	38		
Dame v Baldwin	218		
Damon v Granby	178, 189		
Dana v Underwood	234		
Danforth v Schoharie Turnpike Company	60, 155		

LIST OF ADDITIONAL CASES.

xxxi

Dunscomb v Dunscomb	51	Fendall v May	189
Dupuy v John	152	Fenemore v United States	173
Durell v Boderley	261	Fergusson v Norman	127, 128
Dusar v Perit	8	Ferris v Paris	61
Dusenbury v Ellis	371, 386	Filmer v Lynn	164, 169
E		Finney v Bedford Commercial Ins. Co.	362
		Fish v Miller	36
Eades v Vandeput	106	Fisher v Campbell	191, 201, 202
Earle v Hall	295, 297	Fisher v Ellis	361
Early v Reed	200	Fisher v Taylor	200
East London Water Works v Bailey	155	Fisher v Tucker	157
Eckford v De Kay	321	Fisher v Willard	171, 358
Eden v Blake	257	Fishmongers' Co. v Robertson	155
Edgar v Fowler	66	Fiske v New England Marine Ins. Co.	261
Edgell v McLaughlin	66	Flagg v Mann	262
Edwards v Brewer	350	Fleckner v Bank of United States	155, 156
Edwards v Grand Junction Rail- way Co.	155	Fletcher v Morey	83
Edwards v Goodwin	321	Florance v Adams	33
Edwards v Meyrick	36	Floyd v Johnson	177
Egberts v Wood	157	Forrestier v Bordman	4, 5, 8, 27, 28, 114, 171, 209, 212
Egerton v Furzeman	66	Forster v Fuller	381
Eland v Eland	263	Fortitude, The Ship,	170
Elliott v Russell	14	Foster, Ex parte	128
Elliott v Swartwout	378, 389	Foster v Essex Bank	306
Ellis v Wheeler	234	Foster v Hoyt	131, 132, 142, 148
Elton v Larkins	261	Foster v Pearson	14
Elwell v Shaw	181	Foster v Preston	6
Elworthy v Billing	36	Fowle v Alexandria	296
Ely v Hallett	261	Fowler v Shearer	181
Emerson v Providence Hat Manufacturing Co.	157, 169, 175	Fox v Drake	377
England v Downs	157	Franklin v Osgood	177
Episcopal Charitable Society v Episcopal Church	171	Franklin v Robinson	105
Erick v Johnson	172, 318	Frazier v Erie Bank	338
Evans v Nicholl	139, 364	Frazier v Willcox	64
Evans v Wells	292	Freeland v Heron	52
Everett v Coffin	145, 147	Freeman v Boynton	345
Everit v Strong	157	Freeman v Otis	377
Evertson v Tappen	36	French v Reed	18, 19
Eyre, Ex parte	158	Freestone v Butcher	164
Eyre v Everitt	70	Frisbee v Larned	247, 253
F		Frost v Beekman	263
		Frothingham v Haley	31, 171
Fairfield v Adams	361	Frye v Lockwood	389
Fairlie v Hastings	256	Fulton Bank v New York & Sharon Canal Co.	262, 264, 319
Fairmaner v Budd	254	Furman v Haskin	121
Fanning v Dunham	107	G	
Farnam v Brooks	34, 52		
Farrow v Rees	263	Gable v Hain	291
Farwell v Boston and Worcester Rail Road	296	Gall v Comber	112
Feize v Wray	144	Gallatian v Cunningham	33, 34, 36
		Galt v Galloway	186
		Gardner v Rowe	83

Garrett v Handley	361, 362	Grimstone v Carter	263
Garth v Howard	256	Grindley v Barker	178
Gausson v Morton	185	Grinnell v Cook	127, 142
General Interest Ins. Co. v Rug-		Gunn v Cantine	361
gles	259	Guy v Oakley	212
George v Claggett	149	Gwynn, Ex parte	107
Gerard v Basse	157		
Gibbon v Young	5		
Gibson v Colt	197, 201	H	
Gibson v Jeys	36		
Gibson v Stewart	60	Haille v Smith	131
Gibson v Winter	284, 362	Haldenby v Spafforth	171
Gidley v Lord Palmerston	378	Hall v Bainbridge	151
Gill v Brown	377	Hall v Laver	131
Gilkeson v Snyder	256	Hall v Newcomb	23
Gillett v Campbell	155	Hall v Noyes	3
Gillett v Peppercorne	33, 37	Hall v Smith	30
Gilman v Brown	147, 262	Halsey v Whitney	15
Gilman v Elton	96	Hammond v Cottle	4
Gilmore v Pope	361	Hamond v Holliday	10
Girard v Taggart	324, 361	Hampton v Speckanagle	38
Glengal, Earl of, v Barnard	315	Hanbury v Litchfield	26
Glengall, Earl of, v Frazer	256	Hanford v McNair	157, 15
Gladstone v King	259	Hannay v Stewart	256, 27
Gloucester Bank v Salem Bank	45	Hardman v Willcock	10, 8
Godefroy v Dalton	5	Hargreaves v Rothwell	20
Godfrey v Saunders	178	Harker v Anderson	21
Godin v London Assurance Co.	130	Harman v Anderson	
Goodenow v Tyler	5, 27, 212	Harp v Osgood	3
Goodman v Harvey	234, 239	Harper v Fox	1
Gordon v Church	331	Harper v Williams	361, 3
Gordon v Coolidge	173, 192	Harris v Johnston	2
Gordon v Lewis	38	Harrison v Elvin	1
Gorham v Gale	300	Harrison v Sterney	1
Goring v Edmond	70	Harris v Mabry	2
Gosling v Birnie	10	Hart v Ten Eyck	
Goss v Lord Nugent	257	Hartley v Munson	1
Gould v Oliver	262	Hartford Bank v Barry	156, 1
Gould v Rich	4, 209	Harvey v Turner	28,
Gouverneur v Lynch	263	Hastelow v Jackson	
Graham v Coape	38	Hastings v Lovering	
Graham v Dyster	214	Hatfield v Phillips	
Graham v Fretwell	160	Hathaway v Crocker	
Graham v Musson	160	Havens v Hussey	
Grajan v Wade	324	Hawes v Forster	
Grant v Van Schoonhoven	53	Hawes v Watson	
Graves v Eades	132	Hawkes v Dunn	
Gray v Murray	3, 4, 17, 175	Hawley v Cramer, 33, 34, 36,	
Gray v Portland Bank	294		59,
Gray v Thompson	51	Hawley v James	
Green v Beals	157	Hawley v Mancius	10
Green v Miller	177, 178	Hawtayne v Bourne	
Green v Slayter	263	Haycraft v Creasy	
Green v Winter	33, 36, 38	Hayden v Middlesex Turnpike	
Greenlaw v King	36	Corporation	
Greenough v Gaskell	322	Hayward v Hayne	
Greenwood v Curtis	63, 54	Haywood v Sheldon	
Gregson v Ruck	316	Hays v Stone	4,
Griffith v Griffith	262, 263	Hazard v Irwin	

LIST OF ADDITIONAL CASES.

xxxiii

Hearsey v Pruyn	389	Hussey v Allen	170, 189
Hedley v Bainbridge	158	Huston v Mitchell	291
Hefferman v Addams	181	Hutchinson v Reed	86, 338
Herring v Clobery	322	Hutton v Bragg	147
Hendricks v Judah	121		
Hendricks v Robinson	129		
Hibblewhite v McMorine	157		
Hicks v Whitmore	160, 315	I	
Higgins v Senior	248, 381	Illinois, State of v Delafield,	212, 213
Hill v Featherstonhaugh	105	Ingersoll v Bokkelin	145
Hill v Reardon	235	Ingleby v Swift	69, 70
Hills v Bannister	381	Iram v Seton	157
Hine v Handy	107		
Hodgson v Anderson	185		
Hodgson v Dexter	378	J	
Hodgson v Temple	64		
Hodgkinson, Ex parte	157	Jackson v Baker	48, 212
Hoffman v Carow	212, 218	Jackson v Bowen	263
Hogan v Shorb	324, 334	Jackson v Burtis	178
Holbrook v Wight, 10, 79, 80, 139,	142, 147, 363	Jackson v Cadwell	263
Holderness v Collinson	128	Jackson v Given	178
Holdridge v Gillespie	36, 38	Jackson v Neely	263
Holl v Griffen	10	Jackson v Van Dalsen	33
Holland's Assignees v ———	187	Jacob's Case	390
Holly v Huggefurd	128, 142, 337	Jacob's v Latour	142
Holman v King	235	James v Bixby	170, 246, 388
Holmes v The United States Insurance Company	242	James v Le Roy	106, 340
Holt v Holt	35	James v Williams	253
Hood v Fahnestock	262, 263	Jaques v Todd	162, 200, 202
Hopkins v McNaffey	181	Jaques v Withes	64
Hopkins v Mollinieus	164	Jarvis v Rogers, 128, 130, 136, 145,	214
Hosmer v Bebee	212	Jeffrey v Bigelow, 197, 202, 262, 302	
Host v Withery	157	Jenkins v Gould 11, 47, 105, 192	
Hough v Doyle	271	Jennings v Merrill	233
Hourquebie v Girard	89	Jew v Wood	10
Housatonic and Lee Bank v Martin	267	Jewett v Palmer	263
Houston v Robertson	186	Joel v Morrison	295
Howe v Henriquez	142, 147	Johns v Simons	170
Howson v Hancock	66	Johnson v Hudson	64
Hoxie v Carr	263	Johnson v Lines	164
Hubbard v Elmer 178, 256, 271		Johnson v The Mc Donough,	128, 145
Hudson v Bevett 157, 319		Johnson v Weed	253
Hudson v Granger 364		Johnston v Usborne	5
Hudson v Hudson's Administrators	33	Jolly v Blanchard	129
Hughes v Smith 51, 69		Jombart v Woollet	90
Hughes v Wheeler 253		Jones, Ex parte	107
Hughs v Boyer 297		Jones v Hake	319
Hulse v Young 362		Jones v Jones	357
Hum v Union Bank of Louisiana, 17		Jones v La Tombe	377
Hunt v Rousmaniere's Administrators 53, 181, 184, 187		Jones v Littledale	381
Hunter v Atkyns 11, 12		Jones v Noy	189
Hunter v Jeffery 234		Jones v Pugh	322
Hurlbert v Pacific Insurance Company 112, 331		Jones v Smith	263
		Jones v Tripp	11
		Jones v Wilson	109
		Judson v Seaver	121
		Judson v Sturges	4

K			Lee v Munroe	256,
Karthaus v Yllas y Ferrer	157		Leeds v Marine Insurance Com- pany	256, 271,
Keating v Price	257		Lees v Nuttall	33
Keech v Sandford	35		Lempriere v Pasley	
Kelly v The City of Brooklyn	155		Leonard v Huntington	189,
Kelly v Munson	173, 288, 324		Le Roy v Crowninshield	
Kemp v Coughtry	5		Leslie v Guthrie	
Kendrick v Delafield	170		Leverick v Meigs, 3, 6, 27, 41,	
Kennedy v Gadd	66		Levering v Rittenhouse	
Kensington, Ex parte	140		Levy v Bank of United States	
Kent v Lowen	107		Lewis v Gamage	
Kerns v Piper	202		Lickbarrow v Mason	
Kerr v Lord Dungaunon	263		Lightbody v North American Insurance Company	188,
Ketchell v Burns	234		Lillie v Hoyt	35
Keyes v Brush	157		Lime Rock Bank v Plimpton	
Kidney v Stoddard	260		Lincoln v Battelle	177,
Kiernan v Saunders	10		Lindenau v Disborough	
Kinder v Shaw	213		Lister v Payn	
King v Lenox	299		Little v O'Brien	
Kingston v Kincaid	3, 4, 281, 290		Little v Phoenix Bank	
Kingston v Wilson	3, 5, 18		Livingston v Lynch	
Kip v Bank of New York	89, 90		Livingston v Roosevelt	
Kirby v Taylor	53		Lobdell v Baker	169, 201, 256,
Kirby v Turner	53		Locke v Stearns	
Kirkpatrick v Stainer,	248, 371, 373		Lodge v Phelps	64,
Kirtou v Braithwaite	290		London and Birmingham Rail- way Company v Winter,	155,
Kling v Hammer	178		Long v Baillie	
Knapp v Alvord	128, 187		Loug v Colburn	
Kortright v Buffalo Commercial Bank	155		Loomis v Pulver	
L			Lorraine v Cartwright	3,
Laborde v Consolidated Associ- ation	45		Losee v Dunkin	
La Farge v Kneeland	389		Louisiana State Bank v Seneral	
Lagow v Patterson	192		Lowber v Shaw	
Lamb v Lady Park	295		Lowell, Inhabitants of, v Boston &c. Railroad	296,
Lamoureux v Hewit	234		Lucas v Bank of Darien	
Lancaster v Evers	38		Lucas v Dorian	
Lander v Clark	128, 257		Lucas v Groning	
Lane v Ironmonger	164		Ludlow Charities	
Langdon v Potter	291		Ludlow, Mayor &c. of, v Charl- ton	155,
Lauu v Church	132		Ludlow v Simond	59
Lansing v Gaine	121		Lupton v Lupton	
Lansing v Lansing	121		Lutz v Linthicum	
Langton v Hughes	64		Lynch v Nurdin	
Lanyon v Blanchard	149		Lyon v Jerome	1,
Lartigue v Peet	114		Lyster v Burroughs	
Lausatt v Lippincott	145		M	
Lawless v Shaw	189		MacDonnall v Harding	
Lawrence v Dale	242		Machul, Ex parte	
Lawrence v Taylor,	157, 159, 160 171, 200		Mackay v Bloodgood	
Laying v Stewart	386		Mackay v Rhinelander	
Leaycraft v Demprey	52		Mackintosh v Marshall	
Leayroyd v Robinson	213, 233			

LIST OF ADDITIONAL CASES.

XXXV

Maddeford v Austwick	34	Mechanics Bank v Levy	338
Magee v Atkinson	381	Mechanics Bank of Alexandria	
Magill v Hinesdale	10, 181, 182	v Bank of Columbia, 155, 156, 198	
Magill v Kauffman	271		234
Mainwaring v Brandon	7, 367	Mechanics & Traders Bank of	
Manby v Long	155	New Orleans v Montserrat	70
Manilla v Barry	3, 4	Medbury v Watson	260
Mann v Forrester	149	Menderback v Hopkins	109
Manufacturers and Mechanics		Merrick's Estate	189, 324, 326
Bank v Gore	253	Merril v Sloan	262
Many v Beekman Iron Compa-		Merritt v Clason	316
ny	5, 180, 319	Merritt v Lambert	202, 263
Marks v Pell	52	Merryweather v Nixon	152
Marquand v Webb	388	Messier v Amery	212
Marsden v Pausball	213	Metcalf v Lumsden	161
Marsh v Martindale	107	Metropolis, Bank of v Gutschlick	155
Marshall v Parsons	100	Metropolis, Bank of v Jones	156
Martin v Brooklyn, Mayor, &c.		Meux v Rees	263
of,	299	Meyer v Barker	371, 381
Martin v Hawks	132	Miles v Bough	175
Martin v Temperley	295, 301	Miles v Cattle	10
Masterman v Cowrie	107	Miles v Langley	263
Mason v Joseph	176	Miller v Livingston	102
Maund v Monmouthshire Canal		Miller v Malice	200
Company	155, 296	Milligan v Wedge	296
Maunder v Conyers	162	Mills v Bank of United States	5
Mauran v Lamb	361	Mills v Banks	179
Mauri v Heffernan	370, 372	Mills v Hunt	372
Maxwell v Dulwich College	155	Milton v Mosher	157
Mayhew v Eames	267	Minard v Mead	181
Maynard v Rhode	261	Minor v Mechanics Bank of	
McAlister v Hoffman	66	Alexandria	70, 155, 156
McBride v Hagan	157	Mitchel v Ede	139
McClure v Purcell	271	Mitchell v Great Works Milling	
McCluskey v Webb	33	& Manufacturing Company,	155
McComb v Wright	160, 372	Mitchell v Winslow	83
McCredie v Senior	158	Mitford v Mitford	83
McCready v Guardians	178	Moens v Heyworth	260
McEwen v Montgomery County		Moffatt v Parsons	290
Mutual Insurance Company,	200,	Mohawk Bank v Burrows	132
	262	Moneypenny v Hartland	105
McFadden v Jenkins	63	Monte Allegre, The,	197, 257
McGahey v Alston	70	Moody v Webster	130
McIlreath v Margetson	53	Moore v Frowd	105
McIntosh v Slade	301	Moore v Hitchcock	127
McIntyre v Trumbull	300	Morgan v Stell	188
McKay v Young	33	Morison v Gray	239, 364
McKea v Bank of Mount Pleasant	158	Morris v Coonly	189, 191
McKee v Hicks	157	Morris v Sumnerl	18
McKeon v Caherty	362	Mortimer v Cornwell	2, 160
McKinnel v Robinson	64	Moss v Oakley	155
McKinstry v Pearsall	5, 27, 212	Moss v Rossie Lead Mining	
McKoy v Curtice	178	Company	155, 171, 172
McLanahan v Universal Insu-		Mott v Hicks	155, 237, 370, 386
rance Company	261, 267	Mount v Derick	401
McLaren v Watson's Executors,	234	Mount v Williams	145
McLaughlin v Pryor	295	Mountford v Scott	131, 263
McMorris v Simpson	17, 80	Moussley v Carr	51
Mead v Engs	39	Mowatt v McLellan	389

Mowrey v Walsh	212	O	
Muir v Schenck	83		
Muldon v Whitlock	108, 247, 253	Oakey v Bend	361
Muller v Bohlens	212	Oakley v Crenshaw	40, 367
Mumford v Nicholl	242	O'Callaghan v Sawyer	121
Mumford v M'Pherson	257	Odiorne v Maxey, 2, 114, 171,	200
Munn v Commission Company			213
	25, 189, 201	Orme v Young	70
Murphy v Archdall	132	Orvis v Thompson	178
Murray v Coster	54	Osborn v Bank of United States	
Murray v East India Company			156
	156, 186	Osborne v Kerr	378
Murray v Lylburn	95	Osgood v Franklin	177
Murray v Toland, 49, 129, 172,	361	Owings v Giddings	172
Mynn v Joliffe	279	Owings v Hull	202
		Owings v Peters	4
N		P	
Nash v Mosher	145	Packard v Getman	79
Nathan v Giles	239	Packet, The Ship,	170
National Bank v Norton	264	Padin v Akin	262
Naylor v Mangles	130	Pallecate v Angell	63
Neesom v Clarkson	263	Palmer v Baker	107
Neilson v McDonald	321	Palmer v Mitchell	51
Nelthorpe v Holgate	263	Palmer v Stephens	171, 387
Nelson v Cowing	197, 256	Parker v Brancker	3, 367
Nelson v Powell	247	Parker v Kett	176
Nesbit, Ex parte	132	Parker v United States	253
Newbold v Wright	213, 214	Parkhill v Imlay	4, 32, 39
Newcastle Manufacturing Com- pany v Red River Rail Road Company	248	Parkhurst v Imlay	172
Newcomb v Clark	324	Parkhurst v Van Cortlandt	257
New England Insurance Com- pany v The Sarah Ann	170	Parkist v Alexander	4, 10, 33
New England Marine Insurance Company v DeWolf	114, 271	Parsons v Lloyd	171
Newton v Bennet	51	Paterson v Long	263
New York Firemens Insurance Company	107	Patterson v Hardacre	234
New York State Marine Insu- rance Company v Protection Insurance Company	19	Patten v Thompson	239, 364
Niagara, Matter of Bank of,	105	Peale v Northcote	112
Nicholson v Knowles	10	Pearson v Cardon	10
Nixon v Hamilton	263	Peck v Ellis	152
Nixon v Hyserott	178, 197, 202	Peck v Harriott	191
Noble v Paddock	359, 360	Peisch v Dickson	127, 198
North American Bank v Adams	70	Pelham v Hilder	212
Northampton Bank v Pepoon, 2,	156	Pentz v Stanton, 180, 183, 247,	253
Northern Liberties, Bank of, v Davis	271		381
North River Bank v Aymar, 180, 192 196, 200, 201, 256, 259		People, The, v Dunning	300
North Whitehall v South White- hall	155	Perkins v Bradley	132, 263
		Perkins v Hart	52, 101
		Perkins v Savage	64, 66
		Perkins v Washington Insurance Company	25, 155, 202
		Peter v Beverley	177
		Peters v Ballestier	3, 172, 173
		Peters v Goodrich	263
		Peyroux v Howard	147
		Philips v Belden, 11, 34, 36, 47,	52
		Philips v Rose	257
		Phillips v Huth	223

LIST OF ADDITIONAL CASES.

xxxvii

Pickering v Busk	25, 200	Raymond v Squire	184
Pickering v Pickering	52	Rathbon v Budlong	371, 377
Pierson v Hooker	157	Rathbone v Tucker	247
Piggott v Thompson	361	Rathbone v Warren	59
Pitney v Leonard	263	Raw v Alderson	189
Pitts v Beckett	316	Read v Rann	106
Plets v Johnson	234	Redfield v Davis	5, 41
Polhill v Walter	396	Reed v Norris	38
Pope v Barnett	47	Reed v Warner	33, 38
Porter v Lane	132	Regina v Birmingham, &c. Rail- way Company	155
Porter v McClure	242	Reid v Renselaer Glass Factory	47
Porter v Spencer	59	Renaudet v Crocken	319
Porter v Talcott	247, 253	Rensselaer Glass Factory v Reid	109
Port Gibson, Bank of, v Burke	142	Reynolds v Rowley	271
Post v Kimberley	59, 200, 242	Rice, Matter of,	132
Post Master General of United States v Cochran	69	Rice v Austin	137, 242
Pothonier v Dawson	305, 367	Rice v Gove	319
Pott v Bevan	169	Rice v Stearns	236, 237
Pouverin v Louisiana State Ma- rine and Fire Insurance Com- pany	100	Richards v Platel	132
Powell v Village of Newburgh,	108	Richardson v Cartwright	161
	152	Richmond Manufacturing Com- pany v Starks	31, 171, 172
Powell v Waters	120, 262	Ridgley v Dobson	319
Power v Kent	132	Rinner v Bank of Columbia	5
Pratt v Putnam	4, 31, 171	Ripley v Gelston	389, 390
Pray v Edie	23	Robert's Will, Matter of,	236
Prescott v Flinn	170, 312	Roberts v Ogilby	10
Prevost v Gratz	52	Robertson v Livingston, 27, 40,	367
Price v Ralston	89	Robinson v Ward	47
Pridmore v Harrison	277	Robinson v New York Insu- rance Company	100
Priestly v Fowler	296	Robinson v Yarrow	170
Putnam v Sullivan	201, 234	Robinson v Morgan	271
		Robson v Wilson	90
		Rocher v Busher	321
		Rochester, Bank of, v Monteith,	381
		Roe v Prideaux	179
		Rodriguez v Heffernan, 213,	214
			263
		Rogers, Ex parte	178
		Rogers v Kneeland	171, 189
		Rogers v Hosack's Executors	53
		Rogers v Mechanics Insurance Company	5
		Rogers v Rogers	34
		Rose v Hart	130
		Rosevelt v Dale	260
		Ross v Dole	132
		Rossiter v Rossiter, 171, 192,	202
			381
		Rowley v Stoddard	53
		Ruggles v General Interest Insu- rance Company	259, 261
		Rumball v Wright	319
		Rundle v Moore	3, 18
		Russell v Ball	237
Q			
Quackenbush v Leonard	38, 78		
Quarman v Burnett	296, 297		
Quarrier v Colston	64		
Queen, The, v Justices of Surry,	345		
Queiroz v Trueman, 213, 215,	221		
R			
Rabone v Williams	149		
Raleigh v Atkinson	185		
Ramsay v Gardner	108, 152		
Randall v Van Vechten, 155,	171		
	370, 372, 377		
Randell v Brown, 131, 137,	140,		
	147		
Randleson v Murray	296		
Randolph v Ware	18		
Rapson v Cubitt	279		
Raymond v Crown and Eagle Mills	247, 249, 369		

S		
Sadler v Lee	262	Sinclair v Jackson 177
Safford v Wyckoff	156, 234	Skinner v Dayton 2, 114, 157
Sage v Sherman	359	171, 180, 202, 370
Salem Bank v Gloucester Bank,	156	Skinner v Gunn 197
Salmon v Davis	157	Skyring v Greenwood 40
Saltus v Everett	169, 170, 239	Sleath v Wilson 295
Sandford v Handy, 189, 197, 201		Slee v Manhattan Company 36, 38
202, 209, 259, 302		Slocum v Pomeroy 233
Sandford v Mickles	121	Smedes v Bank of Utica 19
Sands v Taylor	209	Smethurst v Taylor 201
Sargent v Morris	361, 362	Smith, Ex parte 90
Savill v Barchard	130	Smith v Birmingham and Staf-
Scarfe v Morgan	128	fordshire Gas Light Company
Schermerhorn v Loines	247, 253	155, 156, 171
Schieffelin v Stewart	51	Smith v Butcher 177
Schemmelpenich v Bayard	171, 202	Smith v Chester 45
Schmaling v Thomlinson	175	Smith v Condry 75, 301
Schmidt v Blood, 130, 142, 299, 306		Smith v Dunn 5
Schneider v Heath	260	Smith v Hammond 10
Schofield v Heafield	53	Smith v Lascelles 18
Schultz v Astley	234	Smith v Lawrence 295
Scott v Crawford	10	Smith v Mercer 45
Scuykill Navigation Company		Smith v Sleep 362
v Harris	339	Smith v Van Nostrand 383
Seabury v Hungerford	234, 257	Smither, Ex parte 185
Scarle v Scovell	170	Smout v Ilbery 186, 187, 396
Sellen v Norman	48	Snook v Davidson 149
Scaif v Tobin	374	Snow v Perry 202
Selsey, Lord, v Rhoades	34	Somers v Balabrega 291
Sewall v Allen	299	Soulden v Van Rensselaer 321
Sewall v Fitch	160, 315, 359	Spear v Ladd 156
Seymour v Hoadley	147	Spears v Hastley 130
Sharp v Emmett	39, 112	Spencer v Field 160, 183, 362
Shaw v Arden	105	Spring v South Carolina Insu-
Shaw v Coster	10	rance Company 130, 146
Shaw v Harvey	85	Sproul v Hemmingway 296
Shaw v Nudd, 2, 31, 160, 172, 324		Stackpole v Arnold, 2, 181, 183, 254
Shaw v Picton	40	257
Shaw v Rhodes	49	St. Andrews Church v Tomp-
Sheehy v Mandeville	253	kins 263
Sheffield v Watson	378	Stafford, Mayor, &c. v Till 155
Shelton v Livius	257	Stafford v Wyckoff 238
Shephard v De Bernales	374	Stainer v Tyson 201, 202
Sheriff v Axe	105	Stalker v McDonald 234
Sherwood, In re	105	Stanley v Chester and Berken-
Sherman v Roys	361	head Railway Company 155
Shields v Davis	362, 363	Starr v Vanderheyden 11
Shiras v Morris	171, 319	Stead v Salt 157
Shilcock v Passman	5	Steele v Babcock 51
Shirley v Wilkinson	261	Steelman v Webb 132
Short v Skipwith	4	Stephens v Badcock 49
Short v Sparkman	361	Sterry v Arden 263
Siffken v Wray	144	Stevens v Robins 129, 130
Sigourney v Munn	263	Stevens v Wilson 213, 233
Simond v Hibbert	128	Steward v Duncan 10
Simpson, Ex parte	83	Stewart v Aberdeen 284
Sims v Brittain	49	Stewart v Dunlap 259
		Stewart v Huntingdon Bank, 271
		Stewart v Kip 319

Stewartson v Watts	256, 271	Tippets v Walker, 175, 180, 378, 381	
Stiles v Burch	33	Tobey v Barber	253
St. John, Lord, v Boughton	176	Tobin v Crawford	374
St. John v Diefendorf	132	Toland v Murray	361
St. John v Redmond	171	Toler v Armstrong	63
Stockton v Demuth	256, 271	Tom v Goodrich	157
Stone v Denny	260	Tonkin v Fuller	185
Stone v Codman	295	Torrey v Bank of Orleans	33, 36
Stone v Wood, 180, 370, 377,	381	Toulmin v Steere	263
	386	Towle v Stevenson	171
Stonehouse v Gent	170	Towne v Jaquith	177
Storking v Sage	108, 152	Townley v Deare	10
Stoughton, Town of, v Baker	175	Townsend v Corning, 180, 181, 183	
Strode v Blackburne	213	Townsend v Drakeford	316
Strode v Dyson	197	Townsend v Hubbard, 181, 182, 183	
Stubbs v Lund	354	Tradesmen's Bank v Astor, 200, 202	
Stuyvesant v Peckham	322	Tradesmen's Bank v Merritt	338
Suart v Welch	10, 108	Treval v Fitch	234
Sumner v Williams	381	Tribune, The Schooner	170
Susquehannah Insurance Com-		Trimbey v Vignier	235
pany v Perrine	264	Tripler v Olcott	49
Sussex Peerage	235	Trongott v Byers	340
Sutherland v Briggs	263	Trotter v Curtis	107
Sutton, First Parish in, v Cole	177	Troup v Wood	68
Sutton v Tatham	5, 212	True v Fuller	234
Suydam v Bartle	107	Trueman v Loder, 5, 175, 188, 202	
Swan v Nesmith	41		207, 315
Swift v Tyson	121, 234	Tucker v Humphrey	350, 356
		Tucker v Trustees of Rochester, 155	
		Turner v Burrows	5
		Turpin v Bilton	18
T			
Taber v Cannon	378	U	
Taber v Perrott	277		
Taft v Brewster	180, 381	Union Bank v Clowey	70
Taintor v Prendergast, 248, 324, 326		United Insurance Company v	
	361, 372	Scott	170, 242
Tapley v Butterfield	157	United States v Astley	53, 157
Taunton &c. Turnpike Company		United States v Fillebrown	102
v Whiting	361	United States v Hardyman	5
Taylor v Ashton	260	United States v Lyman	253
Taylor v Binney	234	United States v MacDaniel	102
Taylor v Green	164	United States v Parmele	324
Taylor v Robinson	137	United States v Ripley	102
Taylor v Salmon	33, 324	United States v White	234
Taylor v United States	359	United States v Wyngall	189
Terry v Fargo	169	United States, Bank of, v Bever-	
Thalhimer v Brinckerhoff	256	ly	178
Thatcher v Winslow	361	United States, Bank of, v Binney	200
Thompson v Giles	90		
Thompson v Ketcham	235	United States, Bank of, v Dan-	
Thompson v Perkins, 41, 42, 86, 89		dridge	155
Thompson v Stewart	202	United States, Bank of, v Davis, 39	
Thompson v Trail	350	107, 178, 256, 259, 262, 267	
Thorn v Hicks	388	United States, Bank of, v Dunn, 156	
Thorne v Deas	18, 19	United States, Bank of, v Stearns	358
Tiernan v Andrews	247		
Tillier v Whitehead	169		
Tilton, The Schooner,	33		

United States, Bank of, v Bank of Washington	389	Wells v Evans	157, 181
Urquhart v McIver	145, 212	Wells v Spring	157
V		Wendell's Executors and Heirs v Van Rensselaer	36
Vale v Phoenix Insurance Com- pany	261	West v Reid	263
Vallett v Parker	120, 234	Westwood v Bell	151, 325
Van Amringe v Peabody	213	Westzinthus, Matter of,	239
Vanada v Hopkins	178	Wetherell v Jones	63
Van Allen v Vanderpool	27	Wheeler v McFarland	147
Van Buren v Olmstead	38	Wheelwright v Depeyster	218
Vanderburgh v Hull	358	Whelpdale v Cockson	36
Van Epps v Van Epps	33, 36	Whichcote v Lawrence	36
Van Horne v Fonda	10, 36	Whipple v Lansing	321
Van Ostrand v Reed	157, 253, 257	Whitbeck v Van Ness	253
Van Reimsdyk v Kane	64	White v Bartlett	10, 390
Van Rensselaer v Morris	254	White v Skinner	382
Van Staphorst v Pearce	233, 361	Whitehead v Anderson	348
Varnum v Martin	5	Wickens v Townsend	132, 133
Veil v Mitchell's Administrators,	89, 95	Wild v Bank of Passamaquoddy,	156
Ventress v Smith	218	Wilkin v Wilkin	104
Vermilyea v Phoenix Bank	319	Williams v Attenborough	36
Vertue v Jewell	144	Williams v Birbeck	188, 202, 263
Vianna v Barclay	4, 31, 172	Williams v Everett	185
Violet v Patton	234	Williams v Hance	107
Vischer v Yates	66, 335	Williams v Hodgson	157
W		Williams v Littlefield, 4, 28, 51,	129
Waldo v Martin	102	Williams v Mitchell	170
Walker v Geisse	234	Williams v Nichols	170
Walker v Swartwout	378	Williams v Piggott	11
Walkill, Overseers of, v Overseers of Mamakating	109	Williams v Storms	51
Wallace v Bradshaw	4	Williams v Williams	235
Wallis v Manhattan Company,	189, 347	Williams v Woodard	179
Walter v Ross, 137, 215, 239,	324	Williamson v Pierce	296
Wanstall v Pooley	296	Willinks v Hollingsworth	31, 171
Warburton v Edge	132	Willis v Bank of England	267
Waring v Cox	364	Willton v Reaston	23
Waring v Mason	372	Wilmot v Smith	289
Waring v Robinson	158	Wilson v Beverley	295, 306
Warner v Griswold	5	Wilson v Brett	77
Warner v McKay	364	Wilson v Codman's Executors,	329
Warren v Manufacturers Insu- rance Company	64	Wilson v Fuller	302
Watson's Executors v M'Laren,	234, 253	Wilson v Greenwood	36
Webb v Plummer	5	Wilson v Troup	178, 184
Webster v Seekamp	170	Wilson v Turnman	171
Wedderburn v Wedderburn, 36,	48	Winch v Fenn	107
Weed v Smull	52	Winsor v McLellan	83
Wellman v Nutting	24	Winship v Bank of United States,	200
		Winter v Lord Anson	262
		Winterbottom v Wright	297
		Wiseman v Vandeputt	144
		Withington v Herring	25
		Withwell v Gartham	178
		Wolff v Horncastle	4, 23
		Wolff v Koppel	41
		Wood v White	189
		Woodin v Burford	197
		Woodley v Boddington	10
		Woodruff v Cook	33, 34
		Woodruff v Merchants Bank	234

LIST OF ADDITIONAL CASES.

xli

Wooley v Batte	153	Yarborough v Bank of England,	155
Woolsey v Tompkins	178	Yates v Brown	296
Wormley v Wormley	33, 263	Yates v Foot	66, 335
Worrall v Johnson	132	Yates v Russell	178
Wright v Snell	130, 330	Young v Cole	5, 9
Wright's Lessee v Deklyne	257		
Wrightson v Pullan	192		
		Z	
Y		Zebach v Smith	178
Yarby v Grisby	191		

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TREATISE

ON THE

LAW OF PRINCIPAL AND AGENT.

CHAPTER I.

OF THE RELATION OF PRINCIPAL AND AGENT.

PART I.—SECTION 1.

THE relation of Principal and Agent takes place wherever one person authorizes another to do acts, or make engagements in his name.

In all cases where a man has power as owner, or in his own right, to do any thing, he may do it by another ;(A)

(A) || “ Agency,” Mr. Chancellor Kent says, (2 Comm. 612,) “ is founded upon a contract either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name, or on his account, and by which the other assumes to do the business and to render an account of it. The authority of the agent may be created by deed or writing, or verbally without writing ; and for the ordinary purposes of business and commerce, the latter is sufficient.” *Commonwealth v. Griffith*, 2 Pick. 18 ; *Long v. Colburn*, 11 Mass. Rep. 98.

“ That power of acting which one man has, being transferred to another, is called an authority, and this the law allows of ; for as a contract is no more than the consent of a man’s mind to a thing, if such consent or concurrence appears, it would be very unreasonable to oblige him to be present

as to sell his lands, goods, &c. but a bare authority can only be executed by the person to whom it is given.(a)

at the execution of every contract, since it may be as well performed by any other person delegated for that purpose." Bac. Ab.—Authority A. In the next paragraph it is said:—"But such delegation or authority must be by deed, that it may appear that the attorney or substitute had a commission or power to represent the party; also that it may appear that the authority was well pursued." That this position must be taken in a very restricted sense will appear from the sequel. Post, 158, and the passage just quoted from Kent's Commentaries.

A person duly authorized to act for another is denominated an agent, which is *nomen generalissimum*, and includes a variety of persons who are authorized to act for their principal with powers more or less extensive, either by the express terms of the power, or by implication. The terms *agent* and *attorney* are frequently used synonymously: (*Pratt v. Putnam*, 13 Mass. R. 363.) Thus we constantly speak of a letter, or power of attorney, as the formal instrument by which an agency is created. But the term *attorney* is often taken in a more limited sense, and confined to the person whom a litigant has delegated to represent him in judicial proceedings in a court of law. The attorney who performs the same functions in a Court of Equity is denominated a *Solicitor*. In the Admiralty and Ecclesiastical Courts he is called a *Proctor*.

There are certain persons who are incapable of appointing an agent to act in their behalf. This incapacity arises either from the want of that degree of judgment, which is requisite for the due performance of any act, as in the case of idiots, lunatics, and children of tender years; or, is a disability arising from positive institution; as in the case of married women; and of infants, who, though in other respects competent to act discreetly, have not attained the period of majority assigned by law. The restriction as to married women is perhaps not unqualified; for as a *feme covert* may in many instances act, as regards her separate estate as if she were a *feme sole*, the right of appointing an attorney to act for her, would seem to be a necessary incident. See Story on Agency, § 6.||

(a) 1 Salk. 96; 9 Co. 76; 2 Roll. Rep. 393; *Edmiston v. Wright*, 1 Campb. 88. So an attorney for making livery cannot make another attorney. 2 Roll. Ab. 9; || Post, 175.|| "So if there be tenant for life, remainder, &c. with power to make leases for twenty-one years, he cannot make a lease by letter of attorney, by force of his power, because he has but a particular power which is personal to him." *Lady Graham's case*, 24 Eliz. 9 Co. 76. And things annexed to the person, as homage and fealty, cannot be performed by attorney. Ib. "So it is said, 33 E. III. *Trespase*, 253, the lord may beat his villein with cause or without cause, but if the lord commands another to beat his villein without cause, he shall have an action of battery against him who beats him in such case." Ib.

*Persons who are disqualified from acting in their [*2] own capacity, as infants and *femes coverts*, may yet act as agents for others.(b)

The authority of an agent is created either by deed, by simple writing, by parol, or by mere employment, according to the capacity of the parties, or the nature of the act to be done.(c) It is said to be *general* or *special* with re-

|| Mr. Justice Story, after noticing the two last positions subjoins:—"On the same account, where an act is required by statute to be done by the party, if it can be fairly inferred from the nature of the act that it was intended to be personally done, it cannot be done by an attorney. Thus, for example, where a *feme covert* is authorized by the laws of a state to convey her right in any real estate by deed, duly acknowledged by her upon a privy examination of a magistrate, it may be presumed that she cannot acknowledge the same by an attorney." Story on Agency, § 12, note 2. In the case here put, there is something more than presumption: for it is difficult to conceive how the requisite of "privy examination" could be complied with, in the case of an acknowledgment by an attorney. As to agents deriving their authority under a statute, see *Lyon v. Jerome*, 26 Wend. 485, cited more fully, post, 175, n.||

(b) Co. Lit. 52, a.; *Emerson v. Blonden*, 1 Esp. Cas. 142; *Palethorp v. Furnish*, 2 Esp. Cas. 511. || It is evident that a person *non compos mentis* cannot be an agent; and Mr. Justice Story considers that it is by no means clear that a *feme covert* may act as agent against the express dissent of her husband, "as such agency may involve duties and services inconsistent with those which appertain to her peculiar relations to her husband and family." Story's Ag. § 7. By the Civil Code of Louisiana, "a married woman may act as a mandatary, and her acts will bind the mandator and the person with whom she contracts in her name; although she be not authorized by her husband, but the mandator has no action against her on the contract." Art. 1780, and see art. 2970. Post, 189, n. 7.||

(c) Post, || 155, et seq.; *Skinner v. Dayton*, 19 Johns. Rep. 513; *Mortimer v. Cornwell*, 1 Hoff Ch. Rep. 351; *Berrien v. M'Lane*, id. 439; *Stackpole v. Arnold*, 11 Mass. Rep. 28; *Long v. Colburn*, id. 98; *The President, &c. of the Northampton Bank v. Pepoon*, id. 292; *Shaw v. Nudd*, 8 Pick. 9; *Clark v. Richards*, 1 Conn. Rep. 58, 9. The editor is indebted to Mr. Justice Story, (Agency, § 64, n.) for the following valuable extract from Bell's Commentaries on Commercial Law, (b. 3, pt. 1, c. 4, § 4, art. 410): "The power of a factor, or agent or broker is conferred, either, *first*, in writing; formally by power of attorney, or more loosely in correspondence; or, *secondly*, by parol agreement; or, *thirdly*, by mere employment. If the powers are special, they form the limits of the authority; if general, they will be more liberally construed, according to the necessities

ference to its object, i. e. according as it is confined to a single act, or is extended to all acts connected with a particular employment.(1) With reference to the manner of its execution, it is either *limited* or *unlimited*, i. e. the agent is either bound by precise instructions, or left to pursue his own discretion.(2)

of the occasion, and the material, or ordinary, or reasonable course of the transaction.

“(1.) In the management of the affairs of a foreign merchant, especially where there is occasion to discharge debts and receive money, or to carry on judicial proceedings, a power of attorney is the proper evidence of authority. It empowers the factor to represent the principal, and act as he might have done if present.

“(2.) But agents, or factors, or brokers are generally appointed in mercantile affairs by letter. So, a confidential clerk is authorized to accept or endorse bills by a letter addressed to him, expressed in the simplest terms, and without either technical words or the solemnities of a formal deed. So, in the course of correspondence, goods are consigned from abroad, with directions to the consignee to sell them, and either to apply the proceeds in a particular way, or to place them to account; or merchants or manufacturers, with an accumulation of goods on hand, place them with another, (ex. gr. a general agent or another merchant,) who agrees to manage the sales, and to advance a certain proportion to be reimbursed out of the sales; or one is desired to buy goods for another, and either entrusted with credit or money for that purpose, or left to make the purchases as he can, on his own or the principal's general credit; or goods are sent to the warehouse of a general agent, with particular directions as to their disposal, or to be sold at the ordinary rate of the market.

“(3.) In the course of mercantile dealings, goods are placed with general agents, or sent to public warehouses, and the power of disposal entrusted to brokers; and so an agency to this effect is constituted without writing of any kind. Many great merchants in London and elsewhere have neither goods nor warehouses in their possession, but entrusting all their goods to brokers and agents, confine their own attention to the great lines of commercial intercourse.

“(4.) Mercantile agents have authority frequently conferred on them by mere implication. This generally is grounded on the sanction given by the employer to credit raised by a person acting in his name. Such is the power implied from giving sanction to the acts of a procurator; as where a clerk accepts or endorses bills for his master, which that master pays as legitimately accepted, or allows to be as well transferred as if endorsed by himself.”||

(1) † See 1 V. & B. 209.†

(2) † See the distinction between a *general* and an *unlimited* authority

It is proposed to consider the effect of the relation of Principal and Agent, first, with respect to these parties themselves, namely, their mutual *obligations and [*3] rights ; secondly, with respect to other persons who may be affected by it.

SECTION 2.

The Duties of Agents.

The particular duties and responsibilities of agents vary according to the nature, end, and terms of their employment ; but some are incident to their general character, which will therefore be noticed in the first place.

pointed out by Lord Ellenborough in *Whitehead v. Tuckett*, 15 East, 408.†
‡ Post, 199, and note 9, *ibid.* Nelson, C. J. points to the same distinction. He says :—“ A general agent is bound to exercise a sound discretion in the business in which he is engaged, and he possesses all the necessary implied powers within the scope of his authority for this purpose. An authority to settle accounts implies a power to allow credits ; to sell a horse to make a sale in the usual way. The agent stands in the place of his principal, in respect to the particular business, and should conduct it as a prudent and discreet man should manage his own affairs. The doctrine in relation to a *special agent* is different : as a general rule it may be said *he* is confined to his instructions ; but the authority of the agent being limited to a *particular business* does not make it special ; it may be as *general* in regard to that, as if the range of it was unlimited.” *Anderson v. Cronley*, 21 Wend. 279.
“ The authority of a general agent is not unlimited ; it must necessarily be restrained to the transactions and concerns appurtenant to the business of the principal. Thus, one who was authorized to buy the raw materials, and to sell the manufactures of a manufacturing company, could not by implication have authority to buy ships or real estate, or any other thing having no relation to the establishment. So, if one was authorized generally to sign promissory notes for the debts of the principal, it could not be reasonably intended, that he might, by implication, have authority to give notes binding his principal to pay the debts of strangers ; or to pledge the credit of his principal as a surety for goods which were not bought for him, and which never came to his use.” *Odiorne v. Maxcy*, 13 Mass. Rep. 181.¶

The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions; (A) for if he unnecessarily exceed his commission, or risk his principal's effects, without authority, he renders himself responsible [to the principal] for the consequence of his act. (B) If loss ensue, it furnishes no de-

[A] || *Leverick v. Meigs*, 1 Cowen, 668; *Peters v. Ballestier*, 3 Pick. 501; *Gray v. Murray*, 3 Johns. Ch. Rep. 167; *Rundle v. Moore*, 3 Johns. Cas. 36; *Kingston v. Wilson*, 4 Wash. C. C. Rep. 311. Where the instructions are explicit, the agent can exercise no discretion. *Courcier v. Ritter*, 4 Wash. C. C. Rep. 551; *Kingston v. Kincaid*, 1 Wash. C. C. Rep. 454; *Banorgue v. Hovey*, 5 Mass. Rep. 36, 7. "When an agent abroad is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter pricing the articles, and stating the amount of the charges on the shipment, nothing can be more clear, than that the sum stated in the invoice is the *minimum* by which the agent is to be governed. As to the actual cost of the articles, it is almost impossible that the agent should know any thing about it, and very improbable that he should know even the real market price, at the place of shipment; and it is not to be supposed that the principal could intend to refer his agent to an uncertain standard, when the order carries with it one which is certain." Washington, J., *Loraine v. Cartwright*, 3 Wash. C. C. Rep. 151. But when the business, which makes the object of an agency, may with equal advantage to the principal, be done in two or more different ways, the agent may in general do it in either, provided a particular mode has not been prescribed to him. But when his authority prescribes a particular way of doing the business, he will not be at liberty to perform it in any other way. Thus an authority to sell by auction will not support a sale by private contract. 1 Liv. Pr. and Ag. 103. *Daniel v. Adams*, Ambl. 495.||

(B) || The obligation of a factor or consignee to conform to the instructions of his consignor, with the exceptions to the rule, was considered by the Supreme Court of the United States, in the case of *Brown v. M'Gran*, 14 Peters, 479, where Story, J., who delivered the opinion of the majority of the court, (two of the judges dissenting, but on what grounds does not appear,) lays down the following positions: 1. In particular circumstances a wish expressed by a consignor to a factor, may amount to a positive command. 2. In the case of a simple consignment of goods, without any interest in the consignee, or any advance or liability incurred on account thereof, the wishes of the consignor may fairly be presumed to be his orders; and this expression in a letter from the consignees to the consignor, "your wishes in respect to the cotton are noted accordingly," may be presumed an assent to follow the orders. But very different considerations might apply where the consignee should be one clothed with a special interest, and

fence to him, that he intended the benefit of his princi-

a special property founded upon advances and liabilities. 3. Whenever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property in the goods, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances, or meet such liabilities; unless there is some agreement between himself and the consignor which contracts or varies this right. 4. If contemporaneous with the consignment, or advances, or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold before a fixed time, in such a case the consignment is presumed to be received subject to such order; and the factor is not at liberty to sell the goods to reimburse his advances until after that time has elapsed. So, where orders are given not to sell below a fixed price; unless the consignor shall, after due notice and request, refuse to provide other means to reimburse the factor. 5. In no case will the factor be at liberty to sell the consignment, contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. 6. When the consignment is made generally, without any special orders as to the time and mode of sales, and the factor makes advances or incurs liabilities on the footing of such consignment, the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such manner as the usage of trade and his general duty require, and to reimburse himself for his liabilities out of the proceeds of the sale: and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities.

So, the Supreme Court of Massachusetts held, that a commission merchant, having received goods to sell at a certain limited price, and made advances upon them, has a right to reimburse himself by selling them at the fair market price, though below the limit, if the consignor has refused, upon application, and after a reasonable time, to repay the advances. *Parker v. Brancker*, 22 Pick. 40. Wilde, J. in delivering the judgment of the court in that case, said:—"But after such a reasonable time had elapsed, and a demand had been made upon the plaintiff to repay the money advanced, and he had refused so to do, he had no further power, by any principle of law or justice, to control the defendants' right of sale to their prejudice. Such a power would be inconsistent with the understanding of

pal.(a) And on the other hand, if he thereby obtain an

(a) *Beawes*, Lex Merc. 41, 43 ; *Malyne*, 154. 4 *Catlin v. Bell*, 4 Campb. 184. In this last case, goods, which the master of a vessel had undertaken

the parties, as it must be presumed to have been when the advances were made ; and it would enable the plaintiff to impair the defendant's security, at his own will and pleasure, for an unlimited time, if he were disposed so to do. To sanction such a right would be to operate injuriously on the interests of consignees, and would check the continuance of those large advances, by the aid of which a flourishing trade has been carried on for years past, to the great profit of the mercantile community. For although such advances may sometimes lead to overtrading, and may induce individuals to venture upon rash speculations, yet it cannot be doubted, that on the whole they have contributed to the increase of the wealth and prosperity of the country."

If foreign merchants send out, by their general agent, written orders to their factors in this country, to purchase tobacco on their account, but to ship it in the name of the factor, and by those orders the factor is referred to the verbal communications of the general agent, who is stated to be sent out on purpose to superintend the shipment, and he undertakes to order the tobacco to be shipped in the name of another person, and declares he has authority from the foreign merchants thus to control and vary their orders ; the factor is justified in obeying the new orders of the general agent, in opposition to his written instructions. This reference to the verbal communications of the general agent, unqualified by any restriction whatever, is a declaration of complete confidence placed at least in his veracity by the principals, and is a full authority given by them to the factor to credit the representations which he should make. *Manella v. Barry*, 3 Cranch, 415. 1 Liverm. Ag. 371.

Letters of instruction from a merchant to his consignee and factor, not expressly mentioning a price below which goods consigned for sale shall not be sold, but merely communicating a belief that the excellent quality of the goods will command a certain price, and expressing it as the sum confidently expected to be realized on a sale, will not be construed as fixing the *minimum* price at which the goods shall be sold ; and a sale for a less sum by the factor, in good faith and without negligence, will not be deemed a breach of instructions, nor render the factor liable in damages. *Woodworth*, J. said :—" The letter of June 18, 1816, accompanying the consignment of the wines says, ' its price is £52 per pipe,' expressing a hope that it may be readily sold, being of superior quality. The defendants, in reply, stated that the market was overstocked, that saving sales could not then be effected ; and that the plaintiffs might be assured of their best exertions, *when it could be without a sacrifice*. I incline to think the plaintiffs did not intend, by the instructions, to fix the *minimum* price at £52. The expressions

to sell in the *West Indies*, had been delivered to him for that specific purpose ; and he, being unable to procure a market for them there, had sent

seem rather to have proceeded from a belief that the excellent quality of the wine would command that sum ; and, therefore, instead of directing generally, to sell for the best price that could be obtained, they specify the sum confidently expected to be realized ; probably to prevent precipitancy in the disposition of the property, and induce greater exertion if, unfortunately, they had consigned to an unfavorable market. The fact that the instructions are somewhat ambiguous, supports this construction ; for if an express limitation was in view, at the time, it is reasonable to expect that it would have been explicitly given. What was the state of the market was unknown. If unfavorable, it must have occurred to the plaintiffs, how are the defendants to act ? Such a state of things would seem to call for explicit directions as to the *minimum* price. The omission, I apprehend, was not accidental ; the plaintiffs intending not to interfere with the sound discretion of their agents.—The answer of the defendants appears to be in accordance with this construction. ‘ They would close the sales when it could be done without a sacrifice.’ Such was undoubtedly their intention, as faithful agents, anxious not to disappoint the expectations of their principal. Had they considered themselves expressly restricted, it is more probable they would have suggested the improbability of effecting a sale on the terms required, and the propriety of vesting in them, a discretion to act as circumstances might require. The market was such as to warrant this course. But admitting that the words of the letter will bear a stricter construction, or that the defendants at the time, may have supposed that they were limited ; this is not conclusive upon them. The question is not whether the defendants, in the first instance, considered themselves limited, but were they so by the plaintiff’s instructions.” *Vianna v. Barclay*, 3 Cowen, 281.

The principal’s instructions to his factor ought to be unequivocal. *De Tastet v. Crousillat*, post 18, n. (1). If ambiguous, the factor has the benefit of the doubt. *Kingston v. Kincaid*, 1 Wash. C. C. Rep. 454.

A substantial compliance may, under circumstances to be left to the jury, be equivalent to a literal performance of the principal’s instructions. *Parkhill v. Imlay*, 15 Wend. 451.

A factor for the purchase of goods has no right to impose terms upon his principal, as the condition of delivery, which were not sanctioned by the order for making the purchase. By imposing such terms, he varies his character from that of factor, to a vendor, and until acceptance by the principal subject to the condition, he, as a vendor, is liable for the destruction of the property previous to delivery. Thus, it was held by the Supreme Court of New York, that where orders are given to a factor, to purchase at an extended credit, and to forward goods of a particular description, and from the character of the market for which they are intended, it is important that they should be delivered forthwith ; and the purchase is made, and the goods forwarded to a correspondent of the factor, with instructions

them by another person in search of a market to the *Carraccas*, where they were destroyed by an earthquake. Lord Ellenborough held, that a special confidence having been reposed in the master as to the sale of the goods, he had no right to hand them over to another person and to give them a new destination; and the plaintiff (the owner of the goods) recovered against him in an action for not accounting to her. † || So, Marshall, C. J. says; "that an agent is bound to pursue the orders of his principals, and is answerable for any injury consequent on his departing from them, however fair may have been his motives for such departure, is a plain principle of law which has not been drawn into question." *Manella v. Barry*, 3 Cranch, 415. So, a merchant of Philadelphia sent a cargo of coffee to his correspondent at Bourdeaux, and wrote to him as follows: "you will please to make sale of the coffee immediately on arrival, and forward the returns in the articles under mentioned, by the same schooner." It was held, that it was the duty of the agent to sell immediately on arrival, no matter at what loss, if he could; or as soon as he could: he had no right to exercise any discretion. *Courcier v. Ritter*, 4 Wash. C. C. Rep. 449. A case (*Bertram v. Godfrey*, 1 Knapp's Privy Council Rep. 381,) which seems to be analogous in principle, is mentioned in Russell's Treatise on Factors and Brokers, 52. "Where a commission was given to a mercantile house to sell and transfer stock, 'when the funds should be at 85 per cent, or above that price,' such commission was construed to be a particular commission, under which the agent was bound to sell when the funds reached 85; and not a general commission, under which he might defer selling until the funds got above that price." See post, 208.

The principal being about to proceed on a distant voyage, ordered insurance to be made on his life for £3000, and the defendant undertook to pay the premium, and have the business completed, which was done. The de-

not to deliver them to the principal until paid for in cash, or approved paper given, payable in *ninety days*, when the factor had purchased at a credit of *six months*; and the goods after arrival, and before delivery are consumed by fire, while in the possession of the correspondent of the factor, the loss falls upon the factor and not upon the principal. Sutherland J. in delivering the opinion of the court, says: "The terms of the defendants order, taken in connection with the evidence, clearly show that the defendant's expected the goods to be purchased upon an extended credit, and that their immediate delivery was considered all-important; that the sale for the season would otherwise be lost, such, then, was the legal effect of the defendants' order; and the plaintiff in undertaking to exact immediate payment, and refusing to deliver the goods until paid for, if he intended to be considered as factor or agent in the transaction, violated his instructions and made the goods his own; he became in fact, a vendor offering terms of sale. There is no evidence to show the defendant's acceptance of those terms, and the goods, therefore, at the time of their destruction, were at the risk of the plaintiff." *Williams v. Littlefield*, 12 Wend. 362.||

defendant afterwards, alleging that there was a mistake in the order, without the knowledge of the principal, procured the policy to be cancelled, and the premium returned, and another policy to be executed for £450. The principal having died within a year, the defendant was held responsible to his legal representative for the amount of the original policy, (the subsequent policy being excluded from the account,) deducting the premium. *Gray v. Murray*, 3 Johns. Ch. Rep. 167, 83.

Where an agent voluntarily disobeys the instructions of his principal, and converts to his own use money belonging to his principal, to which a definite and specific destination was given, and the article which he was directed to buy subsequently acquires additional value, the agent has been held responsible, not merely for the money with interest, but for the article. *Short v. Skipwith*, 1 Brockenbrough's Rep. 103.

Where an agent having a sum of money in his hands, belonging to his principal, is directed to remit it by purchasing and forwarding a bill of exchange, he should purchase the bill with such money, and not by his own credit. *Hays v. Stone*, 7 Hill, 128.

The following is a case having some analogy as to its facts with *Catlin v. Bell*, *ubi supra*; but the decision appears to have turned upon the custom or usage of trade. It was held that a commission merchant, receiving goods on general consignment from a distant owner, and making advances therefor, might for his own interest and safety, be authorized by the usage of the place in certain circumstances, at his discretion, and for the benefit of himself and the consignor, to ship the goods to a more advantageous market, or one deemed so, especially if a sale at the place would not indemnify him for his advances; and that if such was the known custom of the place (New Orleans,) it would be reasonable to sustain the authority. *Wallace v. Bradshaw*, 6 Dana's (Kentucky) Rep. 385, cited 3 Kent's Comm. 260, n. b.

Mr. Livermore states the subject very perspicuously. He says; "when the power of an agent is limited by instructions, he is bound to pursue those instructions. If he deviate from his orders, though with a view to his employer's interest, he will be liable for the consequences. For example, if he gives credit when his instructions are to sell for cash, or a longer credit than directed, for the sake of a better price and the buyer becomes insolvent, he will be answerable for the debt. Emerigon reports two cases in which the agent was directed to ship goods on board vessels of a particular denomination, as a *felucca*, or a *ship*, and he put them on board a *tartan*, or a *pink*, which were shipwrecked and the goods lost. In these cases the agent was condemned to make good the loss.—Necessity will sometimes justify a factor in acting contrary to orders; particularly if induced by some cause not in the contemplation of the principal, at the time the orders were given. As if the factor be limited to sell goods at a particular price, and the goods are of a perishable nature, and not in a condition to be kept, and the factor has no time nor opportunity for consulting with his principal; in such case, I apprehend, he may sell under the price limited, to prevent a total loss." 1 Liv. Pr. & Ag. 368. So, a supercargo may under peculiar circumstances

advantage, or make a profit, he will not be allowed to retain it; but must account to his principal for the whole, notwithstanding that he bore the risk of failure.(b)

But though every excess of authority is at the hazard of the agent, the principal, by taking the benefit of his act, discharges the agent and embraces the risk himself.(A)

be authorized in departing from, or exceeding his instructions. Story J. "I take it to be clear, that if by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can in the exercise of a sound discretion, to prevent a total loss to his owner; and if he acts *bona fide*, and exercises a reasonable discretion, his acts will bind the owner. He becomes in such a case, an agent from necessity for the owner. Suppose, for example, that a cargo of a perishable nature is shipped on a voyage, and it is to be carried to a particular port of destination, and there sold, and the ship should in the course of the voyage meet with a storm, which should disable her, and she should go into a port of necessity to refit; and that the cargo should be found so much damaged, that the whole must perish before her arrival at the port of destination; would not the supercargo have a right to sell it there, in order to prevent a total loss, although no such case was contemplated in his orders? Certainly he would have a right to sell; and indeed it would become his duty, under such circumstances, to sell. In truth, in all voyages of this sort, there is an implied authority to act for the interest and benefit of the owner, in all cases of unforeseen necessity and emergency, created by operation and intendment of law." *Forrestier v. Bordman*, 1 Story's Rep. 51. In *Judson v. Sturges*, 4 Day's (Connecticut) Rep. 556, where an agent was sent abroad with goods of his principal to sell, but the master left the property at a place short of the original destination; it was held, that the agent under the circumstances of the case had authority to pledge the credit of his principal for another vessel. Another exception to the general rule was intimated in a case cited *infra*. 115. And see *Arthur v. The Schooner Cassius*, 2 Story's Rep. 81-97. *Gould v. Rich*, 7 Metcalf, 538. Post, 209, n.||

(b) *Beawes*, 41; *Russell v. Palmer*, 2 Wils. 325; *Shiells v. Blackburn*, 1 H. Bl. 161. || *Parkist v. Alexander*, 1 Johns. Ch. Rep. 394-7; *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 326.||

(A) || *Wolf v. Horncastle*, 1 Bos. & Pull. 316; *Pratt v. Putnam*, 13 Mass. Rep. 361; *Copeland v. The Mercantile Ins. Co.* 6 Pick. 203; *Forrestier v. Bordman*, 1 Story's Rep. 43; *Courcier v. Ritter*, 4 Wash. C. C. Rep. 549; Post, 171, n. (o); *Hays v. Stone*, 7 Hill, 128.||

Thus, if an agent take upon him to put out his employer's money at interest, unknown to him, and without authority, it is at his own hazard ; but the receipt of interest by the principal, with knowledge, is an affirmance by him of the transaction, and exempts the agent from liability, if the security fail.(c)

In the next place, an agent is bound to use the utmost diligence and care in the execution of his trust. In the absence of specific instructions, it is his duty to pursue the accustomed course of that business in which he is employed.(A) For an employer has undoubtedly a right to expect from an agent, whom he pays for his service, that, without any particular directions, every precaution ordinarily used for the safety and improvement of his property will be observed. And to this end it is incumbent upon an agent, who receives compensation for his labor, to possess such a competent *degree of skill and knowledge in his [*5] business, as would, in ordinary cases, be adequate to the accomplishment of the service undertaken.(d) Thus an agent employed in negotiating bills of exchange, is bound, "First, to endeavor to procure acceptance ; secondly, on refusal, to protest for non-acceptance ; thirdly, to advise the remitter of the receipt, acceptance, or protesting ; and fourthly, to advise any third person that is concerned ;(B) and all this without any delay."(3)(e)

(c) *Clarke v. Perry*, 2 Freem. Rep. 48 ; Eq. Ca. Ab. 708. † And see *Prince v. Clark*, 1 B. & C. 186, post. † || 31, 115.||

(A) || And to transact the business according to the laws of the place in which it is to be done. *Owings v. Hull*, 9 Peters, 608, 27.||

(d) *Russell v. Palmer*, 2 Wils. 325 ; || *Redfield v. Davis*, 6 Conn. Rep. 442 ; *Kingston v. Wilson*, 4 Wash. C. C. Rep. 310.||

(B) || Mr. Justice Story (Agency, § 208) very reasonably questions whether the duty of the agent can be extended to the giving advice to third persons.||

(3) † The case of a bill-broker is here put, of course, merely as an instance. The rule is of general application ; for whoever holds himself out as ready for a proportionate remuneration to transact a particular kind of business for others, is presumed to have the requisite skill for such an undertaking. It extends, therefore, to all professional men, as attorneys, surgeons, &c †

(e) *Beawes*, 431. See with respect to attorneys, 2 Wils. 325 ; 4 Burr.

What the usages of each trade are, is the subject of proof as the occasion occurs ;(A) unless they are such as, by re-

2061 ; ‡ 3 B. & C. 799. ‡ || As to the liability of an attorney for deficiency of skill and diligence, the following language of Tindal, C. J. furnishes an illustration. “ It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking and that *crassa negligentia*, or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar, appear to establish in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court ; for the want of care in the preparation of the cause for trial ; or of attendance thereon with his witnesses ; and for the mismanagement of so much of the conduct of a cause, as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.” —“ We lay no stress upon the fact, that the attorney had consulted his counsel as to the sufficiency of the evidence ; because, we think, his liability must depend upon the nature and description of the mistake or want of skill which has been shown ; and he cannot shift from himself such responsibility by consulting another, where the law would presume him to have the knowledge himself.” *Godefroy v. Dalton*, 6 Bing. 460. And see *Shilcock v. Passman*, 7 Carr. & Payne, 289 ; *Warner v. Griswold*, 8 Wend. 666 ; *Varnum v. Martin*, 15 Pick. 440.|| ‡ And as to auctioneers, see 3 Campb. 451.† || Post, 105.||

(A) || *Young v. Cole*, 3 Bing. N. C. 724. “ A person who employs a broker, must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed.” *Littledale, J. Sutton v. Tatham*, 10 Ad. & Ell. 21. “ It is a reasonable and legal presumption that every man knows the usage of the place in which he traffics, whether by himself or his factor, and if the usage be not illegal, he is bound by it.” *Parsons, C. J. Goodenow v. Tyler*, 7 Mass. Rep. 46 ; Post, 212, note. Tindal, C. J., states it as the general rule, “ that where a doubt was raised by evidence upon the meaning of a mercantile contract, evidence was admissible of the usage or course of trade, at the place where the contract was to be carried into effect, to explain or remove such doubt.” *Bottomley v. Forbes*, 5 Bingh. N. C. 121 ; *Johnston v. Usborne*, 11 Ad. & Ellis, 549 ; *McKinstry v. Pearsall*, 3 Johns. Rep. 319 ; *Smith v. Dunn*, 6 Hill, 545. The rule peculiarly applies in the construction of policies of insurance. *Coit v. The Commercial Ins. Co.* 7 Johns. Rep. 385 ; *Astor v. The Union Ins. Co.* 7

Cowen, 202. But see *Turner v. Burrows*, 5 Wend. 547. Evidence of the custom of trade is inadmissible to vary the express and unequivocal terms of a written contract. *Trueman v. Loder*, 11 Ad. & Ellis, 589; *Camden v. Doremus*, 3 Howard, 515; 3 Kent's Comm. 260, and cases cited, n. b, ibid. But the meaning of mercantile phrases in letters between merchants, is a proper subject for the jury. Gibbs, C. J. said, "The expressions in the several letters from R. Groning & Co., are not easily reconcilable; but the question whether the phrase, 'when duly honored' means, when they were accepted or when they were paid, was a question not so much for the consideration of the court, as of a jury. The jury have pronounced their judgment, and on a case involved in such mercantile obscurity, they have found that the bills were remitted at the risk of R. Groning & Co., not of Doorman." Park, J. "The Solicitor General argues that the phrase, 'duly honored' means accepted; whether it does so or not has been left to the jury, and they have found that it meant due payment; which is the opinion I myself should have formed." *Lucas v. Groning*, 7 Taunt. 164.

Though the terms of a mercantile contract may be ascertained by usage, "it is perfectly clear that new terms cannot be introduced into any written instrument under seal;" [as for instance, a charter party.] Gibbs, C. J. *Gibbon v. Young*, 8 Taunt. 254. "where a positive statute has declared the meaning or legal signification of a word, in reference to its use in contracts generally, I am not aware of any case in which a court of law has gone so far as to receive parol evidence to explain a written contract, expressed in the language of the statute, by showing that the statutory term in that particular contract meant something else than that which the legislature had declared should be its meaning." Walworth, Ch. *Macy v. The Beekman Iron Co.*, 9 Paige, 195.

Evidence of usage has been admitted to show that demand of payment of a promissory note on the fourth day after it became due, was sufficient to charge the endorser. *Renner v. The President &c., of the Bank of Columbia*, 9 Wheat. 581; *Mills v. The Bank of the United States*, 11 Wheat. 431.

Mr. Justice Story has, however, expressed a pointed disapprobation of the admission of usage, in strong and emphatic language. "I own myself," he says, "to be no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses, relative thereto, which has been in former times so freely resorted to; but which is now subjected by our courts to more exact and well defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and imperfect notions of the subject; and therefore it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy; as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts." *Rogers v. Mechanics Ins. Co.*, 1 Story's Rep. 608. It was well observed by the late Lord Tenterden, (Treatise on Shipping,

peated proof, have come to be recognized by the law ;(A) as those which relate to bills of exchange, and some other known instruments of trade. And agents are not only responsible for the performance of these duties in their own persons, but are sureties for those whom they themselves employ in the execution of the service they undertake.(f)

472, sixth edition) "every mercantile practice of frequent use, and even of general convenience, is not, and ought not to become in all its consequences, a part of the law of the land ;" and on this principle our courts have reserved to themselves the right of judging of the reasonableness of those usages, and of allowing or disallowing them accordingly. *Rus. Fact. & Br.* 71 ; 1 *Bell's Comm. on Merc. Jur.* 390 is there referred to "where it is laid down by that learned writer, that three things are necessary to settle a usage, as a rule of the law merchant, 1. Proof of the usage ; 2. The legality of it, or at least, that it is not inconsistent with the common law, but an allowable deviation from it, and 3. The allowance of the custom judicially." Of the two alternatives, it is assuredly better that the merchants should receive their law from the courts, than the courts theirs from the merchants. See further, *United States v. Hardyman*, 13 *Peters*, 176 ; *Webb v. Plummer*, 2 *Barn. & Ald.* 746 ; *Chandler v. Belden*, 18 *Johns. Rep.* 162 ; *Forrestier v. Bordman*, 1 *Story's Rep.* 54 ; *The Citizens Bank v. The Nantucket Steamboat Co.*, 2 *Story's Rep.* 17, 37, 45, 50.||

(A) || *Post*, 281, 189 ; *Kemp v. Coughtry*, 11 *Johns. Rep.* 109 ; *Renner v. Bank of Columbia*, 9 *Wheat.* 581.||

(f) *Lord North's case*, *Dy.* 161. || *Kemp v. Coughtry*, 11 *Johns. Rep.* 107. *Clark v. Richards*, 1 *Conn. Rep.* 59. So, the plaintiff having a claim against the United States, for money in lieu of bounty lands, employed the defendant to procure the money from the United States, and executed a power of attorney containing a clause of substitution. On the trial, the weight of evidence was, that the plaintiff and defendant agreed that the money should be remitted by draft ; the defendant, by an instrument in writing substituted V. and R. of Washington, or either of them, to procure the money, directing them by letter, to forward the money by mail, after taking out commission. The money was accordingly procured, and put into the Post Office at Washington, directed in a letter by V. and R. to the defendant. There was no very satisfactory proof that the defendant had received it. The circuit judge charged the jury, that by construction of law V. and R. were the agents of the defendant and not of the plaintiff ; and the receipt of the money by them rendered the defendant liable ; but that if such was not the construction of law, yet if the original direction of the plaintiff was, to have the money remitted in a draft, and the defendant changed it, then V. and R. were his agents, and he was liable. At any rate, if they found the money was actually received by the defendant, he was liable. Verdict for

*2. The rule that agents are responsible for damage [*6] arising from breach of orders, negligence, or incompetence, admits of few or no exceptions in regard to agents who receive hire or reward for their service.(g) Yet, independently of this consideration, the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the actual performance of it. Therefore a gratuitous or voluntary agent, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound to exert such a portion of activity and care, as may reasonably satisfy the trust reposed in him.(h)

But a gratuitous promise does not render the person making it answerable, as a hired agent is, for neglecting to

the plaintiff. A new trial was refused; and Savage, C. J. delivering the opinion of the court, said: "The points ruled by the judge must be taken in reference to the facts of the case. Whether in general, the substitute is the agent of the attorney and not of the principal, we need not decide. The substitute is certainly the agent of the principal for some purposes. In this case, V. executed a release to the government, as the attorney of the plaintiff and his wife, which no doubt is valid and obligatory; and had he not forwarded the money to the defendant, he would be liable to pay it to the plaintiff. So far, therefore, as the judge expressed an opinion on the abstract proposition that V. and R. were the agents of the defendant, I am inclined to think he erred. But it seems to me to have no necessary connection with the case. The defendant was employed to procure certain moneys to which the plaintiff was legally entitled. The proper documents were furnished for that purpose, and the mode in which the remittance should be made is pointed out. The defendant directed a different mode of remittance, and the money was lost. Upon this state of facts, nothing can be clearer than that the defendant is liable. He constituted V. and R. his own agents for the purpose of remittance. Then the receipt of the money by them was, in effect, a receipt by the defendant; and makes him liable in this action." *Foster v. Preston*, 8 Cowen, 198. Where an agent may properly appoint a sub-agent, it is still his duty to oversee his conduct, and when anything appears to be wrong to take the earliest steps to secure his principal from loss. *Amory v. Hamilton*, 17 Mass. Rep. 108.¶

(g) *Shiells v. Blackburn*, 1 H. Bl. 159. ¶ *Leverick v. Meigs*, 1 Cowen, 645.¶

(h) *Coggs v. Barnard*, 2 Ld. Raym. 909, and see § Sir Wm. Jones's *Treatise on the Law of Bailment*, where this subject is fully and elaborately discussed.†

proceed at all in his undertaking ;(i) nor is he liable, except for gross negligence ;(k) nor, lastly, is he bound to possess competent skill for the execution of the service.(l) If, however, he possess that skill he is bound to exert it ; and the possession of it will sometimes, from his situation or office, be presumed against *him.(m)(4) These distinctions will be explained more fully in the sequel.(n)

SECTION 3.

1. The responsibility of an agent is not confined to the loss of his commission, but extends to the amount of the damage which the principal suffers, either by direct injury occasioned to his own property,(a) or by his being obliged to make reparation to others.(b) As if a man engage in

(i) 2 Ld. Raym. 909. || Post, 19, n. 6.||

(k) Ib. and see post, || 77. ||

(l) 1 H. Bl. 161.

(m) 1 H. Bl. 161.

(4) † The doctrine here laid down is scarcely strong enough. If a person undertake to do an act in some *professional capacity*, whether gratuitously or otherwise, the degree of skill and care which is ordinarily requisite for the exercise of such a profession will it is apprehended, in all cases be expected from him. See *Dartnall v. Howard*, 4 B. & C. 345, in which this proposition is assumed.‡ || *Park v. Hammond*, 6 Taunt. 495 ; *Chapman v. Walton*, 10 Bing. 57 ; *Leverick v. Meigs*, 1 Cowen, 645.||

(n) Ch. I. Pt. 2. || p. 76-7.||

(a) 2 Moll. 327 ; Roll. Abr. 105 ; *Lewson v. Kirk*, Cro. Jac. 265.

(b) A verdict obtained against the principal, for the act of his servant, is the measure of damages against the latter. *Green v. N. R. Company*, 4 T. R. 490 ; † and see *Miller v. Falconer*, 1 Campb. 251 ; *Gevers v. Mainwaring*, Holt, N. P. C. 139 ;‡ || *Mainwaring v. Brandon*, 8 Taunt. 202. A sub-agent, as well as the primary agent, may be liable to the original principal. As, where A. not having any interest in certain lands allows B. to use his name as a lessor of the plaintiff in ejectment, on condition that he be put to no costs, and B. employs an attorney to bring a suit in A.'s name, as lessor, without informing him of the condition, A. on being subjected to the costs arising from a nonsuit in the ejectment, may

certain covenants for himself, his servants and agents, the latter knowingly violating those covenants, whereby the principal is charged with the breach of them, are liable over to him.(c)

2. The damage, however, must be a real, and not a supposed or probable injury merely ; and *therefore [8] an agent is not liable for the neglect of an act expressly directed, if the act, when performed, would not have entitled his employer to any legal benefit ; but only have conferred a probability of advantage, founded upon mere courtesy.(d)

3. Neither is an agent chargeable for a breach of his instructions, if the compliance would have been a fraud upon others.(e)(1) Thus an agent was employed to sell certain articles, and the condition of sale purported that the highest bidder should be the purchaser ; but the agent had private instructions not to sell under a certain sum ; notwithstanding which, he sold for the highest sum bid, though less than the sum prescribed ; and upon an action brought against him by his employer, he had judgment in.

maintain an action against the attorney for the amount. *Bradt v. Walton*, 8 Johns. Rep. 298. As B.'s authority was special, it was the duty of the attorney to ascertain its extent and limitations. Post, 201-2.||

(c) Sid. 298.

(d) *Webster v. De Tastet*, 6 T. R. 157. † This was an action against a broker for negligence in not insuring, according to directions given, three slaves, allowed to a mate of a vessel in lieu of wages, and lost upon the voyage. The court held, that as the mate could not have recovered against the underwriters if the policy had been effected, he could not have a larger remedy against the broker, although from the usage it was probable that the insurance, if effected, would have been paid. The passage in the text is not a very happy generalization of this case. See post, † || 20, n. (s) ; etiam, 18, n. (l).||

(e) *Bezwell v. Christie*, Cowp. 395. || Or where circumstances render a strict compliance impracticable. *Dusar v. Perit*, 4 Binney, 361. Or, an unforeseen necessity arises, which was not originally contemplated ; *Forrestier v. Bordman*, 1 Story's Rep. 51.||

(1) † The technical answer to this, and the like cases, is, that the court will not permit a plaintiff to allege his own fraud.†

his favor, since he could not have obeyed his instructions without practising a fraud upon the bidders. (*f*)

[*9] *4. The law likewise exonerates agents from the consequences arising from their having pursued the regular and accustomed modes of transacting business, although they might, under the particular circumstances, have acted to better advantage. (*g*) This principle is exemplified in several instances which occur in the sequel, and is indeed a just consequence of that responsibility to which they are subjected, by neglecting the prescribed rules of their business. Thus a banker who has received bills from his customer to present for payment, and who takes in payment the acceptor's check, which is afterwards dishonored, has been held to be discharged, because this is the usual course of trade. (*h*)

5. But the mere absence of fraud or bad motive is not sufficient to justify an act detrimental to the employer's interest, unless it be sanctioned by the usual course of business ; (*i*) and although the immediate loss be not occasioned by the agent's fault, (2) yet if it be such as would not have occurred but for his previous ne-

(*f*) *Bexwell v. Christie*, Cowp. 395. But it would have been otherwise, if the direction had been to set the article up at the price mentioned, since no fraud would have ensued from that circumstance. *Id. ib.* (*Howard v. Christie*, 6 T. R. 642.)

(*g*) Post, || 26 ;|| Cowp. 480 ; *Moore v. Morgue*, 2 T. R. 188 ; *Smith v. Cadogan*, || 2 Term Rep. 188,|| *in notis* ; *Pitt v. Yalden*, 4 Burr. 2061 ; || *Young v. Cole*, 3 Bing. N. C. 724.||

(*h*) *Russell v. Hankey*, 6 T. R. 12 ; and see *Ambl.* 219, post, || 46, || and *Warwick v. Noakes*, Peake's N. P. 68, post, || 46.||

(*i*) See this rule as applied to *trustees* exemplified in the case of *Caffrey v. Darby*, 6 Ves. jun. 496, upon the authority of which the position in the text is conceived to be well founded, agents being regarded with less favor than trustees are.

(2) † More correctly thus : " although the loss be not an immediate consequence of any fault in the agent." In *Massey v. Banner*, 1 Jac. & W. 241 ; 4 Madd. 413, even a gratuitous agent was charged with a loss occasioned by the failure of his bankers, the money which had been received under a trust-deed, having been paid in by him *to his own account*, though, so far as appeared, without any intention to misappropriate. † Post, 46.||

glect, as if goods be destroyed by fire in a place where they were improperly suffered by him to remain, he is answerable for the consequence.

6. Besides the positive duties that have been enumerated, the confidence necessarily placed by men in those whom they are obliged to entrust with their affairs, has given rise to certain less determinate maxims,^(A) calculated to prevent its abuse. Therefore it is established in equity as a general principle, (with few exceptions,) that an agent cannot make himself an adverse party to his principal.^(k) This is founded upon a plain reason; for even

(A) || The phrase *determinate* is, perhaps, not a very apt expression as here applied. The maxims of equity are as *determinate* as those of law; but the constitution of courts of equity is such, that they can enforce positive duties beyond the scope of a court of law, either to enforce at all, or so as to afford adequate redress.||

(k) Post, || 33-38, 160, note 7; *Van Horne v. Fonda*, 5 Johns. Ch. Rep. 459; *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 341. Hence, in general, an agent cannot deny the title of his principal to the subject of the agency, or protect himself, in a suit by the principal, by setting up an adverse title in a third person. *Dixon v. Hamond*, 2 Barn. & Ald. 610; *Hawes v. Watson*, 2 Barn. & Cress. 540; *Gosling v. Birnie*, 7 Bing. 339; *White v. Bartlett*, 9 Bing. 378, and *Hardman v. Wilcock*, note, *ibid*; *Kieran v. Sandars*, 6 Ad. & Ell. 515; *Holl v. Griffen*, 10 Bing. 246; *Holbrook v. Wight*, 24 Wend. 169; *De La Viesca v. Lubbock*, 10 Sim. 629; *Roberts v. Ogilby*, 9 Price, 269; *Harman v. Anderson*, 2 Campb. 243; *Steward v. Duncan*, *id.* 344; post, 53, 80, 81; *Parkist v. Alexander*, 1 Johns. Ch. Rep. 397; *Scott v. Crawford*, 4 Mann. & Gran. 1031. Still less can he avail himself of such defence where the party in whom the claim or title resided, has abandoned it. Lord Denman, "Upon the argument a great many cases were cited to show that persons standing in similar situations to the defendant, as warehousemen, wharfingers, and others, had been permitted to set up the *jus tertii*. But no instance could be adduced in which it was held that the *jus tertii* could be set up when the third person, being aware of the circumstances, had abandoned his claim. To allow a depositary of goods or money, who has acknowledged the title of one person to set up the title of another who makes no claim, or has abandoned all claim, would enable the depositary to keep for himself that [to] which he does not pretend to have any title in himself whatsoever. After what passed, the defendant had no right to dispute the validity of the plaintiff's title, or to bring into question the validity of a contract to which he, the defendant, was no party, and

supposing the possibility of his maintaining a strict impartiality between the two opposite interests, yet the em-

which was no longer disputed by those between whom it was made or their representatives." *Betteley v. Reed*, 4 Ad. & Ell. N. S. 511.

The doctrine stated in relation to principal and agent is supported by several legal analogies, and may perhaps all be traced to the equitable rule, that a man shall not defeat a trust which he has once accepted. *The Attorney General v. Aspinall*, 2 Myl. & Cr. 629; *In the matter of the Ludlow Charities*, 3 Myl. & Cr. 264; *Hawley v. Mancius*, 7 Johns. Ch. Rep. 174; *Bowman v. Rainetaux*, 1 Hoff. Ch. Rep. 150. Thus a carrier or other bailee cannot dispute the title of a party who delivers goods to him. *Miles v. Cattle*, 6 Bing. 743; *Betteley v. Reed*, ubi supra. So, a tenant cannot dispute the title of his landlord; or compel the landlord to interplead with a party claiming the land or rent under a paramount title. *Crawshay v. Thornton*, 3 Myl. & Cr. 21; *Attorney General v. Lord Hotham*, Turn. & Russ. 209; S. C. 3 Russ. 415; *Crawford v. Fisher*, 1 Hare, 440; 2 Story's Eq. § 812; *Magill v. Hinsdale*, 6 Conn. Rep. 469. But bills of interpleader have been allowed where both parties refer their title back to the same derivative source. The following is an instance:—Upon the death of a landlord, the tenant, in ignorance of the rights of the parties, attorned and paid rent to certain persons who claimed as devisees under the will of the deceased landlord. The validity of the will was disputed by his heirs at law, who gave notice to the tenant to pay his rent only to themselves. It was held that this was a proper case for interpleader. *Jew v. Wood*, 3 Beav. 579; and see *Townley v. Deare*, id. 212; 2 Story's Eq. § 811-12; *Smith v. Hammond*, 6 Sim. 10. It has been held that a sheriff, who had levied, under an execution, upon property claimed by a third person, could not file a bill of interpleader against such third person and the plaintiff in the execution. *Shaw v. Coster*, 8 Paige, 339; S. C. 2 Edw. Ch. Rep. 405. The decision in that case was placed upon different, though satisfactory grounds, than the relation of principal and agent; but such a relation has been considered as existing between a plaintiff and the sheriff. In *Woodley v. Boddington*, 9 Sim. 214, it was alleged by counsel that "the sheriff is, in truth, the agent of the party at whose instance a writ has issued. If a party is arrested, irregularly, at law, the party who issued the writ is liable to an action for damages." And Shadwell, V. C. adopting the position, as to the particular case, says:—"The sheriff who receives the writ is, to a certain extent, the agent or servant of the plaintiff at law; for any intimation given by the plaintiff at law to the sheriff not to go on, would be an indemnity to the sheriff, and he would be bound not to proceed."

It is a legitimate deduction from the same principle, that an agent cannot, under ordinary circumstances, file a bill of interpleader against his principal; as such a bill, if it does not directly question the principal's title, at least implies that it is doubtful; interpleader as between agent and principal being admissi-

ployer has not that for which he bargains in the employment, viz. zeal and vigilance for his own exclusive advantage.

This confidence is so highly regarded, that courts of equity have sometimes interfered to set aside improvident grants made in favor of *persons confidentially entrusted with the conduct and management of the property so bestowed. On occasion of setting aside a conveyance made under such circumstances, it was said by the Lord Chancellor, "that if the defendant permitted the plaintiff to suppose that he was to take the management of her affairs for her benefit, the known doctrine is, that the fruit of that relation, if it were not absolutely dissolved before the transaction in question took place, could not be permitted to exist."⁽¹⁾ If, therefore, a

ble only, where the adverse claim is under a derivative, and not under a paramount title. *Pearson v. Cardon*, 2 Russ. & M. 606; S. C. 4 Sim. 218; *Crawshay v. Thornton*, 2 Myl. & Cr. 1, 23; S. C. 7 Sim. 391; *Swart v. Welch*, 4 Myl. & Cr. 319; *Cooper v. De Tastet*, Tambl. 177; *Nicholson v. Knowles*, 5 Madd. Rep. 40; 2 Story's Eq. § 817. In *Pearson v. Cardon*, just cited, Lord Brougham says:—"That an agent should have the power of filing a bill of interpleader when the principal demands the re-delivery of goods bailed with him, appeared to me so monstrous a proposition, and to involve such frightful consequences in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine. For in fact, it amounts to this, that an agent may at any moment treat his principal to a chancery suit; and I was therefore relieved to find that the plaintiff's counsel went entirely on the peculiarity of the case." A party by a recognition of the right of one of the claimants, or, (to use a phrase which, in some of the cases cited in this note, has been borrowed from the law of real estate,) who has *attorned* to one of the claimants, may preclude himself from filing a bill of interpleader. *Crawshay v. Thornton*, ubi supra; *Atkinson v. Manks*, 1 Cowen, 706.¶

(1) *Huguenin v. Baseley*, 14 Ves. jun. 299, afterwards affirmed in the House of Lords. There are many cases of this kind arising out of transactions between attorneys and their clients. *Newman v. Payne*, 2 Ves. jun. 199; *Wells v. Middleton*, cited 9 Ves. jun. 294; *Gibson v. Jeyes*, 6 Ves. jun. 267; *Walmesley v. Booth*, 2 Atk. 25; *Bridgman v. Green*, 2 Ves. 627. And it is said, that, independent of all fraud, an attorney shall not take a gift from his client, though the transaction may not only be free from fraud, but the most moral in its nature. Per Lord Erskine, *Wright v. Proud*, 13

man do not choose to act upon the confidence appearing in the course of the transaction to be reposed in him, he

Ves. jun. 138. And Lord Eldon, speaking of this relation, says, it is impossible in the course of the connection of attorney and client, that a transaction shall stand, purporting to be a bounty for antecedent duty. *Hatch v. Hatch*, 9 *Ves. jun.* 296. † See also *Hall v. Hallett*, 1 *Cox*, 135; *Wood v. Downes*, 18 *Ves.* 120; *Ib.* 127; 1 *Ball & B.* 107; *Jones v. Tripp*, 1 *Jac.* 322; *Williams v. Pigott*, 1 *Jac.* 598; *Pitcher v. Rigby*, 9 *Price*, 79; *Falkner v. O'Brien*, 2 *Ball & B.* 214; *Rivett v. Harvey*, 1 *S. & S.* 502; *Cane v. Lord Allen*, 2 *Dow.* 289; *Kenney v. Brown*, 3 *Ridgway's P. C.* 462, 504, 522; *Jenkins v. Gould*, 3 *Russ.* 385.‡ The rules established by courts of equity upon this subject are clearly and succinctly summed up by Hoffman, *Asst. V. Ch.* in the following words:—"From a minute examination of the leading authorities, I deduce these positions as the existing law of the Court (of Chancery.) That a voluntary gift made while the connection of attorney and client subsists is absolutely void, and the property transferred by it can only be held as security for those charges which the attorney can legally make. Next, that a transfer of property made upon an ostensible valuable consideration, such as a lease or sale, is presumptively void; the client has the advantage of driving the attorney to produce evidence to prove its fairness, and to show that the price or terms were as beneficial as could be procured from a stranger. And lastly, [which was the great point in issue,] that a transfer of part of the property actually in litigation, or a contract to transfer a part is doubly void; illegal, because of the doctrine of champerty, as well as because of the existing relation of the parties; that such a contract will not be enforced on the application of the attorney; and if the client applies, will be cancelled on equitable terms." *Berrien v. M'Lane*, 1 *Hoff. Ch. Rep.* 424. Mr. Justice Story, (1 *Eq. Jurisp.* § 310,) gives a conclusive reason for the rule. He says:—"By establishing the principle, that while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former; it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case; a task often difficult, and ill supported by evidence which can be drawn from any satisfactory source." It is, notwithstanding, perfectly well settled, that an attorney or solicitor may buy of, or contract with, his client, and is not to be regarded merely as a trustee dealing with his *cestui que trust*; but then, he is subject to the *onus* of proving that he did not avail himself of his confidential relation to the injury of his client. See cases cited *post*, 35, n. (m.)

Although the controversy in the case of *Hunter v. Atkyns*, 3 *Myl. & K.* 113, did not arise between an attorney and client, yet as that relation is so frequently alluded to in the decision, and the principles laid down have such a direct bearing on the present subject, that one or two extracts from the

elaborate judgment of Lord Brougham in that case, may be properly introduced here. He says, (p. 135,) " I take the rule to be this ; there are certain relations known to the law, as attorney, guardian, trustee ; if a person, standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge which he himself knew. In short, the rule rightly considered is, that a person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself exactly in the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefitted ; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men, men who have the benefits of civility without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him, (whereas, in the case of a stranger, it would lie on those who opposed him,) to show that he has placed himself in the position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson v. Jeyes*, (6 Ves. 277,) that attorney and client, trustee and *cestui que trust* may deal, but that it must be at arms' length, the parties putting themselves in the situation of purchasers and vendors, and performing (as the court said, and, I take leave to observe, not very felicitously or even very correctly) all the duties of those characters. The authorities mean no more, taken fairly and candidly towards the court, when they say, as in *Wright v. Proud*, (13 Ves. 138,) that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may not only be free from fraud, but the most moral in its nature ; a *dictum* reduced in *Hatch v. Hatch*, (9 Ves. 296,) to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing that every thing was voluntary and fair, and with full warning and perfect knowledge ; for in *Harris v. Tremanheere*, (15 Ves. 40,) the court only held that in such a case a suspicion attaches on the transaction, and calls for minute examination." In a subsequent passage (p. 140) the Lord Chancellor says ; " The rule, I think, cannot be laid down much more precisely than I have stated

it ; that where the known and defined relation of attorney and client, guardian and ward, trustee and *cestui que trust* exists, the conduct of the party benefitted must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favor may have arisen out of the connection ; and that where the only relation between the parties is that of friendly intercourse or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and other unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict rule should be laid down,—any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach ! If any one should say that a rule is thus recognized, which from its vagueness cannot be obeyed because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts ; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves.”

Securities given by a client to his attorney are cautiously watched by a court of equity. Lord Eldon held, that the court would not permit an attorney to take from his client a mortgage for costs to be incurred. *Jones v. Tripp*, Jac. 322. Plumer, M. R. in a later case conceived himself, though reluctantly, bound to adhere to that decision, but as the mortgage was given as well for antecedent costs, as prospective costs, it was allowed to stand for the former. *Williams v. Piggott*, id. 598. So, in *Jenkins v. Gould*, 3 Russ. 385, 393, the Lord Chancellor said ; “ Mr. Gould [the defendant] had stood in the confidential situation of solicitor, agent and receiver of Mr. Jenkins [the plaintiff who had filed a bill for a general account and to set aside a security executed by him to Gould ;] and while in that situation (no professional person being employed for Mr. Jenkins) he had obtained from him a mortgage of his estates as a security for the balance of his account. It is admitted that he had never delivered any bill of costs ; that he had never rendered any account of his receipts and payments ; that he had never prepared any such account ; that he had applied to his own use, and without any statement of the amount, the produce of some of the bills drawn or accepted by Mr. Jenkins. Could a settlement under such circumstances, (Mr. Jenkins being by means of the mortgage, and otherwise, so in the power of Mr. Gould,) be conclusive ?” And see *Philips v. Belden*, 2 Edw. Ch. Rep. 15, 16.

Courts of law, so far as they possess, and can enforce jurisdiction, in re-

should reject it as soon as proposed.(*m*) And *not merely agents who are retained for a stipulated reward, but those who officiously or gratuitously undertake the management of another's property,(*n*) are affected by this principle. It seems, however, to have been considered in a recent instance, that a pure gift from an employer to an agent, upon clear evidence of its being the deliberate and well understood act of the donor, with full and accurate intelligence of the value and force of the donation, and under a sense of obligations received, may stand.(*o*) And the rule itself does not apply to agents who are merely employed as instruments in the performance of some appointed service, but is calculated for those who are relied upon for counsel and direction, and whose employment is rather a trust than a service.(*Δ*)

lation to matters of this description, will scrutinize securities given by clients to their attorneys. As, where a judgment was entered by an attorney, by confession, on a bond and warrant of attorney, against his client, and part of the sum for which the judgment was given included costs, the court directed the clerk to inquire into the consideration of the bond, and to require the attorney to adduce proof of the consideration, or answer to interrogatories on oath, and that the costs included in the bond be taxed. "The court, from general principles of policy and equity, will always look into the dealings between attorney and client, and guard the latter from any undue consequences resulting from a situation in which he may be supposed to stand unequal." *Starr v. Vanderheyden*, 9 Johns. Rep. 253.||

(*m*) Per Lord Eldon. *Huguenin v. Baseley*, 14 Ves. jun. 294. || See Lord Brougham's remarks on that case in *Hunter v. Atkins*, 3 Myl. & K. 139.||

(*n*) *Proof v. Hines*, Forrest. 111.

(*o*) *Harris v. Tremenhare*, 15 Ves. jun. 344 ; † *Montesquieu v. Sandys*, 18 Ves. 302.†

(*Δ*) || "A confidential adviser, one who has been generally consulted in the management of the person's affairs, though he may also have been specially employed in his business, does not lie under the same suspicion with an attorney or steward, or any one who has a general management." Lord Brougham, Ch. *Hunter v. Atkins*, 3 Myl. & K. 139. The following case is an instance of the manner in which a court of equity takes hold of transactions between principal and agent, probes them, and relieves the former from the effect of undue influence from whatever cause it may arise. Prior, a merchant, who afterwards became bankrupt, having been for sever-

SECTION 4.

In addition to the foregoing general duties which affect all descriptions of agents alike, there are distinct duties depending upon their respective employments, of which the present treatise chiefly concerns such as regard mercantile affairs, referring to those of a different description occasionally, for the sake only of illustration or uniformity.

[*13] *Of mercantile agents, some are entrusted with the possession, as well as the disposal and management of the property: these are usually denominated *factors*. Others are engaged merely in the negotiation of contracts relating to property, with the cus-

al years previously in embarrassed circumstances, borrowed money at different times of the defendant, who was his confidential clerk, who took various bonds and securities for such loans, for which, by agreement, he was to be allowed a usurious interest: during the period of ten years, Prior and the defendant, from time to time came to a settlement of their accounts, and Prior gave his bonds and further securities for the balance of principal and interest due on such settlements. On a bill filed by Prior's assignees, the court ordered all the bonds, obligations, and settlements to be set aside, and the whole accounts at large to be opened between the parties from the first commencement of their transactions; there being evidence, not only of mistakes and omissions in the accounts, but of oppression, imposition, and undue advantage taken of the necessities of the principal. Kent, Ch. observes; "This is a strong and peculiar case, which calls for relief. There appears to be very great reason to presume an abused confidence. The defendant was the confidential clerk of Prior, and kept his cash accounts, and had free access to all his papers and moneys. From the beginning almost of their connexion, Prior was embarrassed, and had recourse to the defendant for the loan of moneys. This created, at once, a delicate relation between the master and servant; and the rapidity with which debts and loans were accumulated, securities exacted, the load of dependency increased, and blind and necessitous submission yielded, is distressing to learn, even as told in the defendant's answer.—Indeed the taking advantage of a man's necessities, is as wrong as taking advantage of his weakness." *Barrow v. Rhineland*, 1 Johns. Ch. Rep. 550, 556, 557.||

tody of which they have no concern.(1) *Brokers(a)*

(1) † See *Baring v. Corrie*, 2 B. & A. 137.†

(a) Though brokers are often mentioned in the statute law, and many regulations have been enacted respecting them, the law does not seem to have defined what the precise character of a broker is. The stat. 1 Jac. I. c. 21, s. 1, speaks of brokers as employed in the contriving, making, and concluding bargains between merchant English and merchant strangers and tradesmen, concerning their wares and merchandizes, to be bought and sold, and contracted for, and moneys to be taken up by exchange between such merchants, and tradesmen. Sec. 8 of the same statute speaks of brokers in London using and exercising the ancient trade of brokers between merchant and merchant. Several acts of parliament recognize persons making contracts for public or joint stock as brokers, see 8 & 9 W. III. c. 20 and 60; 10 Ann. c. 19, s. 121; 6 G. I. c. 18, s. 21; 7 G. II. c. 8, s. 9. Accordingly one who for hire concludes or bargains in government or South Sea stock, (*Janson v. Green*, 4 Burr. 2104; *Bosworth v. Machado*, 2 H. Bl. 556,) is deemed a broker within the 6 Ann. c. 16, s. 5, which mentions persons acting as brokers generally. But merchants acting by commission from correspondents abroad do not seem to fall within this denomination. Per Lord Mansfield, 4 Burr. 2104. One definition that has been given of a broker is, that of a person who makes a private bargain between other persons, but not a public one; Cowel's Interper. and the preamble to 1 Jac. I. c. 21, seems to give the same idea of their employment. Auctioneers therefore are excluded from the description of brokers. *Dub. Wilkes v. Ellis*, 2 H. Bl. 555. Though the term *auctionarii* is said to signify *brokers*. Spelman's Glossary. Blount's Law Dic. Jacob's Law Dic. tit. *Brokers*, tit. *Auctionarii*.

The number of brokers in London is not limited, as at Amsterdam and some other places, but their admission is regulated by statute. By 13 Edw. I. st. 5. *Stat. Civ. Lond.* no brokers shall be in the city of London, but such as are received and sworn by the warden, or lord mayor and aldermen; and by a charter of Edw. III. none were to be brokers but such as were chosen by the merchants belonging to the mysteries in which they were to act, (*arg.* 2 H. Bl. 557, and see the preamble to 1 Jac. I. c. 21.) By 6 Ann. c. 16, persons acting as brokers in London must be admitted by the mayor and aldermen, under such restrictions and limitations for their honest and good behavior as the said court shall think fit, and shall pay 40s. upon admission, and the same sum annually, under a penalty of 25l. for acting without.(2)

(2) [In 1708, the year after the passing of the statute of Anne, the Court of Mayor and Alderman of the City of London made certain rules and regulations for the government of brokers, which have since been and are still in force, and by virtue of which every person, before being admitted a broker, is required to enter into a bond to the Mayor, Commonalty and Citizens of London, in a penalty of 500l. and also to take an oath, the forms of which are prescribed by the same rules and regulations. The condition of the

are principally of the latter description.(A)

The commission of brokers on contracts for any stock erected by act of Parliament or letters-patent, is limited by 10 Anne, c. 19, s. 12, to 2s. 9d per cent.; and by Sir John Barnard's Act, 7 G. II. c. 8, s. 9, every Stock Broker is to keep a book called the *Broker's Book*, in which he shall enter all contracts, agreements, &c. for stock made by him on the same day with the names of the parties, and the day of making the contract; which book he shall produce when lawfully required. And there is an instance in which on appeal to the House of Lords, in a question relative to the purchase of stock, the broker appearing to have misbehaved himself in his business, by not keeping books of the contracts made by him pursuant to G. II. c. 8, the house ordered that it should be recommended to the Court of the Lord Mayor and Aldermen to sue him upon the bond given for the performance of his duty as a broker. *Dunbar v. Wilson*, 6 Bro. P. C. 60, 1 Ed. 1784.

(A) || "A *factor* is distinguished from a *broker*, by being intrusted by others with the possession and disposal, and apparent ownership of property, and he is generally the correspondent of a foreign house. A *broker* is employed merely in the negotiation of mercantile contracts. He is not trusted with the possession of goods, and does not act in his own name. His business consists in negotiating exchanges, or in buying and selling stock and goods; but in modern times the term includes persons who act as

bond, amongst other things, provides, "That the broker shall, upon every contract by him made, declare and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, thereunto required, and that he shall not directly or indirectly, by himself or any other person, deal for himself in buying any goods, wares, or merchandizes, to barter or sell again upon his own account, or for his own benefit or advantage, or make any gain or profit by buying or selling any goods, over and above the usual brokerage." See the condition of the bond, and the form of the oath at length, in Merivale's Rep. 156, 157, and in Holt's N. P. C. 431, 432, 433. In a late case, where the condition of the bond was brought under the consideration of the Court of Common Pleas, it was held, that if a broker be authorized by his principal to make a purchase for him in his (the broker's) own name, and the contract note be accordingly made out in the broker's name, without inserting that of his principal, such a purchase by the broker does not operate as a breach of the condition of his bond, especially where the broker enters the name of his principal, as being the buyer, in the book kept by him for that purpose. *Kemble v. Atkinson*, 7 Taunt. 260; 1 B. Moore's Rep. 6, S. C. Neither does the condition of the bond absolutely prohibit a broker from dealing as a trader on his own account, but it only operates as a prohibition *sub modo*, that is, it imposes upon him a penalty in the event of his trading. But if in any transaction in which he is really engaged as a principal, he acts ostensibly as a broker, such conduct is a gross fraud, in respect of which he can obtain no remedy in a court of justice. *Ex parte Dyster*, 1 Merivale's Rep. 155; 2 Rose's B. 349, S. C.] | The condition of the bond also prohibits the broker from employing a person, under him as a broker who has not been duly admitted—a prohibition which course does not in terms extend to the case of a person concurring with the broker as partner in the making of contracts. *The Lord Mayor of London v. Brandon*, 2 Stark N. P. C. 14; 1 Holt, N. P. C. 438, S. C. |

*The first consideration then is, to what extent [*14] factors, &c., are responsible for the safety and *preservation of goods, either in their actual cus- [*15] tody, or committed to their protection.

A factor is not answerable against all events for the safety of goods which he has in his charge ; but it is sufficient if *he do all that by his industry he may* for their preservation.(b) The criterion *seems to be, [*16] that he keep them with the same care as he would his own.(c)(3) He is not liable in cases of robbery,(d)

agents to buy and sell, and who charter ships, and effect policies of insurance." 2 Kent's Comm. 622, n. b ; Post, 279, 332. Mr. Russell, Fact. & Brok. 82, hints a doubt as to the distinction between factors and brokers.

A particular description of *broker* is referred to, in one case, viz : a bill broker, as having some distinctive character. In *Foster v. Pearson*, (1 Mees. Crom. & Ros. Rep. 858, cited 2 Stephens N. P. 1917;) Mr. Baron Parke observed ; " In the absence of evidence as to the nature of such an employment, a bill broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth, a bill broker is not a character known to the law, with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country ; it may have powers more or less extensive in one place than in another ; what is the nature of its powers and duties, in any instance, is a question of fact, and is to be determined by the usage and course of dealing in the particular place."||

(b) *Vere v. Smith*, 1 Vent. 121 ; Co. Lit. 89.

(c) *Coggs v. Barnard*, 2 Lord Raymond, 917 ; Holt, 131, S. C. Moor, 462 ; *Woodliff's case*, 7 Vin. Ab. 7, cont. In this respect factors differ from carriers and innkeepers. But the liability of the latter is founded upon a notion of public trust and employment. 2 Lord Raymond, 917 ; || *Elliott v. Russell*, 10 Johns. Rep. 1, 10.|| It is said indeed, *Southcote's case*, 4 Co. 84, that hire is the foundation of the carrier's liability, which reason, if it were the true one, would equally affect factors ; but see 2 Lord Raymond, 916.

The same rule has been laid down with regard to *auctioneers*, || as to the degree of care which they are to take of property sent to them for sale placing their liability, in this respect, on the same footing as that of factors.|| *Maltby v. Christie*, 1 Esp. Cas. 341.

(d) See note (1), Co. Lit. 88 b.

(3) † The criterion given in the text is not quite accurate. It is not suffi-

fire,(e) or any other accidental damage happening without his default.(f) But though the immediate cause of the loss be one which no care could prevent, as lightning or the like, yet if improper delay in the removal of the property had previously intervened, it is not *excused by the nature of the accident.(g)(4)

Though it be [is] in general true, that the trust repose in an agent is personal, and intransferable, yet reasonable convenience, and attention to the benefit of his employer will often justify him in delegating the custody of goods to another ; provided due care is [be] taken to select a proper depository.(A) Thus to an action of account for goods d

cient in all cases that a factor or other depository for hire, should keep goods entrusted to him with the same care as he would his own ; for possibly he might keep his own very negligently, and it would be no excuse the loss or damage of his employer's goods, that he had been equally careless as to his own. The rule is, that he is bound to keep them with much care as a man of *average prudence* would bestow in the keeping his own. See Sir Wm. Jones on the Law of Bailment, and the reference there made to the civil law, upon which the doctrine of our law in this respect avowedly founded. ‡ *Diligence* which is merely a synonym of *care*, " is a relative term ; and it is evident, that what would amount to the requisite diligence at one time, in one situation, and under one set of circumstances, might not amount to it in another." 2 Kent's Comm.

(e) *Anon.* 2 Mod. 100. ‖ *Brisban v. Boyd*, 4 Paige, 17 ; post 18, n

(f) *Anon.* 2 Mod. 100. It is a good discharge before auditors for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast overboard into the sea. Roll. Abr. 124 ; Bro. tit. Account,

(g) *Caffrey v. Darby*, 6 Ves. 496.

(4) ‡ This is a general rule applicable to all cases of bailment.‡

(A) ‖ The deceased was engaged by the owner of a ship, as supercargo for a trading voyage, and was to receive as a compensation, a certain percentage on the proceeds of the outward cargo, and on the nett proceeds of the voyage on its termination. He fell sick during the outward voyage and left the ship, having substituted two persons in his place for the remainder of the voyage, whom he agreed to pay out of his own commissions. He died before his return, it was held, that his representatives were entitled to the full compensation stipulated, the ship having successfully performed the voyage, which produced a large profit to the owner, and the substituted supercargo having faithfully and satisfactorily performed his duty. *Gray v. Murray*, 3 Johns. Ch. Rep. 167-178. An agent, to

livered to the defendant *ad merchandizandum*, he pleaded that he carried them to Porto Bello, and, in order to keep them safe, he put them into the warehouse of the South Sea Company, which was broken open, and the goods taken away. Though it were [was] objected, that the defendant had undertaken a special and particular trust, and having committed the goods to the care of a third person, which he could not do, must be answerable for the loss; yet it was decided in his favor, the Court declaring that a bailiff *ad merchandizandum* is not obliged to keep the goods always about him; and that if the warehouse were [was] not a place of safe custody, that should have been replied.(h) (5)

*2. One of the most important duties which the [*18] safety of merchandize requires, in factors and consignees who act as factors, is that of protecting it by insurance.(A)

Where the course of dealing between the principal and agent is such, that the latter has been used to effect insurances, by directions of the former, he is bound to comply with an order to insure, though he has [have] no effects in

bill of exchange, or promissory note, is sent for collection, is authorized, (such being the usual course of business,) to deposit it in a bank for collection, with a notary for protest, or with an attorney to be put in suit, and is not responsible for their neglect or misconduct. *Hum v. The Union Bank of La.* 4 Robinson's (La.) Rep. 109.||

(h) *Goswell v. Dunkley*, 1 Str. 681. And see *Bromley v. Coxwell*, 2 Bos. & Pull. 438. || In this case A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price: B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England: it was held that A. could not maintain trover against B. for the goods. And see *McMorris v. Simpson*, 21 Wend. 610.||

(5) † The question will be, "has he done that which under the circumstances was prudent and warranted by the usage of trade."†

(A) || See *De Forest v. Fulton Fire Ins. Co.* 1 Hall, 110. He may insure in his own name and recover for the loss, subject to account with his principal. *Ibid.* 114.||

hand at the time of receiving the order ; unless notice has been previously given by him to discontinue that mode of dealing.(i) But if he have effects in hand, he cannot in any case refuse to comply with the order.(k) Or if the bills of lading from which his authority is derived contain an order to insure, this is an implied condition which the agent must fulfil, if he accept the employment.(l)

(i) *Smith v. Lascelles*, 2 T. R. 189 ; Beawes, 43.

(k) *Id. ib.*

(l) *Id. ib.* ¶ Mr. Livermore states the doctrine on the subject with clearness and precision. “ In the three following cases it is settled as clear that an order for insurance must be obeyed :—1st Where a merchant abroad has effects in the hands of his agent or correspondent here, he has a right to expect that his agent will comply with an order to insure ; because he is entitled to dispose of the money in his agent’s hands in what manner he pleases. 2dly. Where a merchant abroad has no effects in the hands of his agent, or correspondent here ; but the course of dealing between them has been such, that the one has been used to send orders for insurance, and the other to execute them ; the former has a right to expect that his order for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. 3dly. Where the merchant abroad sends bills of lading to his correspondent here, with an order to insure, as the condition on which he is to accept the bills of lading ; and the correspondent accepts the bills of lading, he must obey the order ; for it is one transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition. (Per Buller, J. in *Smith v. Lascelles*, 2 T. R. 189.) And in this case the consignee would be bound to effect insurance, though he was to receive no benefit from the consignment. If A. living in Jamaica, sends a cargo to B. residing in London, who is to receive any benefit, but is to deliver it to a third person ; and is directed to insure, B. may refuse to receive the cargo ; but if he consent to receive it, though it is for the benefit of the consignor, he is bound to make insurance, and many actions have been brought upon that principle.”

Agency, 324–326. Lord Erskine in *Crosbie v. M'Doual*, 13 Ves. 158 ; see *Randolph v. Ware*, 3 Cranch, 503. *Morris v. Sumner*, 2 W. C. Rep. 203. *Thorne v. Deas*, 4 Johns. Rep. 101. *French v. Reed*, 10 Ves. 308. Mr. Justice Story adds, as another case in which the agent is bound to insure ; “ where the general usage of trade requires the agent to insure.” Agency, § 190. *Kingston v. Wilson*, 4 Wash. C. C. Rep. 101.

As to the duty of a consignee in regard to effecting insurance, W. C. Story, J. says ; “ The law is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for an insurance, and neglects to do so, or does so, differently from his

If in any of these cases the agent neglect to make insurance, he is himself, by the custom of merchants, to be con-

er in an insufficient manner, he is answerable, not for damages merely, but, as if he were himself the underwriter, and he is of course entitled to the premium. In this case an insurance was effected, valid as far as it went, and had it gone as far as the defendant contends it ought, it would, by the legal decisions in England, [where the insurance was made,] have been inoperative and void, [under the then existing prize law.] But the defendant says, that this ought not to have entered into the consideration of the plaintiffs; that having ordered such an insurance to be made, it was the duty of the plaintiffs to make it, and to secure to the plaintiffs the chance of an indemnity, though founded only on the honor of the underwriters. To this charge of misconduct, the plaintiff has given two answers: first, that he received no orders to effect the insurance, in the manner now contended for; and secondly, that he made the attempt to do it, and could not get it effected. The words 'solid insurance,' contained in the defendant's letters are certainly equivocal. They might mean such an insurance, as would completely protect the property against captures by British cruizers, the imminent dangers of which were perceived by the defendant, and acknowledged and dreaded by the plaintiffs, as their letters evince; or they might mean, that the underwriters should be men of solidity, and able to pay in case of loss. It may be proper here to observe, that a claim for damages against an agent, comes with a bad grace from a principal who complains of a disobedience of orders, couched in ambiguous terms. If with a reasonable attention to the language, the words would bear the construction which has been placed upon them, it would be too much to condemn him to damages, because, upon a refined and critical examination of them, a different construction should be deemed the correct one.—The second excuse depends upon the fact, whether a reasonable diligence was used by the plaintiffs to effect an insurance, as ordered. If it was, they would not be answerable for the want of success which attended those endeavors, even if it were perfectly clear, that the general principle contended for, applies to a case of this kind; as to which we give no opinion." *De Tastet v. Crousillat*, 2 Wash. C. C. Rep. 132–136.

So, the plaintiffs, in 1822, shipped a number of bales of cotton from Alabama, consigned to Boyd & Suydam, the defendants, as commission merchants at New York, to be sold for the account of the shippers; which cotton was received by them in June of that year. In consequence of a regulation of the board of health of New York, it became necessary to store the cotton out of the city, and it was accordingly stored at Brooklyn, the usual place of deposit under such circumstances, where it was soon after burnt and lost. Walworth, Ch. "The complainant claims to charge Boyd & Suydam with this loss, on the ground that it was their duty to have insured the cotton thus deposited with them in a building which was liable to

sidered as the insurer,(B) and liable as such in the
[*19] event of loss.(m) (c) If no *available insurance

be destroyed by fire. The cases cited by the complainant's counsel, in relation to this claim, show that a commission merchant has such an interest in goods consigned to and received by him for sale, that he may insure in his own name to the full value of the goods. But it does not follow from this that it is his duty, without any express or implied directions to that effect from his principal, to insure the goods for the benefit of such principal. And there is no evidence in this case of any usage of trade, from which the duty of the defendants to insure the goods can be implied. If the defendants had made themselves liable for the loss, by their negligence in placing the cotton in an unsafe place of deposit, when a safe one might easily have been obtained, as that fact is not admitted in the answer, the complainant should have filed a replication, and should also have established the fact of negligence by proof. As the case now stands upon bill and answer, I think Boyd & Suydam are not chargeable with the loss upon the cotton which was destroyed by fire." *Brisban v. Boyd*, 4 Paige, 17.||

(B) || In which case he is entitled to credit for the premium which should have been paid. *De Tastet v. Crousillat*, ante, n. (l).||

(m) *Wallace v. Telfair* 2 T. R. 188, in notis; Mal. 86; Beawes, 4 1 T. R. 24; *Delaney v. Stodart*, 2 Ves. 239. || So, in a case before Circuit Court of the United States for the district of Pennsylvania, Washington J. charged the jury, that if one merchant is in the habit of making insurances for his correspondent, and is directed to make an insurance, neglects to do so, he is himself answerable for the loss as insurer, and is entitled to the premium as such: that the amount for which an underwriter would be liable is the only measure of damages against him; if he can excuse himself for not having effected the insurance, he is answerable for nothing; if he cannot excuse himself, he is then answerable for the whole. —An exception being taken to this charge, the judgment was, in February 1809, affirmed by the Supreme Court of the United States. *Morris v. Merl*, 2 Wash. C. C. Rep. 203. Condry's edition of Marshall, note to p. 1 Liverm. Ag. 326. The case in error does not appear to have been reported.

A factor employed to settle with underwriters, and adjusting the loss at a rate far less than that to which the principal would be entitled, without express instructions to that effect, will be liable for the deficiency. *Rundle v. Moore*, 3 Johns. Cas. 36.|| If he [the agent] limits the [insurer or broker] to too small a premium, by which no insurance is effected, he is liable [to his principal]. *Wallace v. Telfair*, 2 T. R. 188, note. where the broker negligently omits to have the usual clauses inserted in the policy, he renders himself liable to the assured for any loss he may thereby suffer. *Park v. Hammond*, 6 Taunt. 495; *Mallough v. Barber*, 4 C. C. 150.4 || As to the liability of an insurance broker for not effecting an insurance, see *Turpin v. Bilton*, 5 Mann. & Gran. 455.||

(c) || There is an implied obligation on the part of an agent employed

be effected, it is the same as if none at all were made.(n)

It has been held that, although no advantage can be taken of a gratuitous promise to procure insurance, in case of a total neglect to do so ; yet, that if a voluntary agent actually proceed to make insurance, but through his gross mismanagement the benefit of it is lost, he is answerable for the injury sustained.(o)(6)

In an action against an agent for a failure in making

effect insurance, according to special instructions, to inform his principal of his having failed in accomplishing the object ; as the latter, on being informed of the failure might have procured insurance elsewhere, or have offered other terms. *Callander v. Oelrichs*, 5 Bingh. N. C. 58. *De Tastet v. Crouillet*, 2 Wash. C. C. Rep. 132.||

(n) Ante, note (m).

(o) *Wilkinson v. Coverdale*, 1 Esp. Cas. 74 ; *Seller v. Work*, Marshall, 208, 3d ed 305 ; || *French v. Reed*, 6 Binney, 308.||

(6) † This also is a rule of general application founded on the clearest principles of equity and expediency. If a man *gratuitously* undertake to do a service for me, although morally it may be wrong in him not to fulfil that undertaking, it is manifest that I have no *right* to enforce the performance. But if he do in fact proceed to the execution of what he has undertaken, it is equally manifest that for gross neglect or mismanagement in the execution he ought to be answerable, inasmuch as I have sustained an injury by being induced to repose in him a trust which might have been punctually fulfilled by another.† || *Thorne v. Deas*, 4 Johns. Rep. 84 ; *Smedes v. The President &c., of the Bank of Utica*, 20 Johns. Rep. 372 ; S. C. in error, 3 Cowen, 662 ; *Boorman v. Brown*, 3 Ad. & Ell. N. S. 511. Mr. Justice Story, speaking of the varied obligations arising from the various classes of bailments, observes : “ where, indeed he [the bailor,] enters into an express contract, there may not, in point of morals, *in foro conscientie*, be any difference in relation to the extent of his duty, or the fidelity to be exacted of him in the performance of it. But law, as a practical science, although it endeavors never to violate any moral duty, is compelled, on many occasions, to leave that duty wholly to the conscience of the party, without any attempt to enforce it by compulsive process. It is, for instance, a rule of the common law, which has its foundation also in other codes, not to enforce contracts made between parties, where there is no valuable consideration for the act to be done. If the act is left undone, the party, although his promise may be ever so direct and positive, is not compellable to perform it. If for instance, a person has gratuitously promised to give another money, the law will not oblige him to perform his promise ; for it is deemed a *nude pact*, (*nudum pactum*,) a naked promise, not clothed with a valuable consideration to support it ; and the maxim is : *Ex nudo pacto non oritur actio*. If, on the other hand, the money has

insurance, as he stands in the place of an insurer,(j) so he is entitled to any defence which an insurer could have made: for if nothing could have been recovered upon the policy, no actual damage has been sustained by default of it.(A) The plaintiff therefore such an action must recover according to his interest, (q) which, as well as the *loss, he must establish in proof: and the defendant may avail himself of *deviation* in the voyage;(r) or the illegality of the intended insurance;(s) † or any other defence of the like nature. And if the policy, being illegal, could not in point of law

been paid, the law will not enable the party to recover it back, because it has been paid in discharge of a moral obligation. But, if a party undertaking to do a thing, does it so ill, that the other party suffers an injury thereby, there, the law will, in many cases, allow the injured party to recover a compensation to the extent of the injury. In respect, therefore, of gratuitous contracts, lying in feaseance, such as mandates, the party can escape all responsibility by a simple refusal to do the act promised. This distinction has been long settled in our law upon principles of general equity; and although it may seem somewhat artificial, it is probably founded in public convenience. It is generally true, in gratuitous contracts, that for non-feaseance, even when the party suffers a damage therefor, no action lies; but for mis-feaseance an action will lie." Story on Bailments, ante, p. 6; post, pp. 76, 77.||

(p) Ante, § p. 18.||

(A) || The case of re-assurance, seems to present an analogy; *New State Marine Ins. Co. v. Protection Ins. Co.* 1 Story's Rep. 458—460

(q) *Harding v. Carter*, Park, 4; *Delaney v. Stodart*, 1 T. R. 24.

(r) *Delaney v. Stodart*, 1 T. R. 22.

(s) *Webster v. De Tastet*, 7 T. R. 157. In that case, the object of the insurance was a bonus to be paid to a seaman at the end of a voyage, which is not an insurable benefit. See ante, p. 8, n. (d), § 18 n. (D), with the case of *De Tastet v. Crousillat*, is cited: among the facts of which the following; that in consequence of a certain decision of the Council of the Admiralty, declaring that policies made in England upon foreign vessels, seized by any of his majesty's privateers, and condemned, were abrogated; it had become a practice, in many instances, for the underwriters of London to execute a policy in common form, and to give a separate endorsement, which they considered binding on their honor, to pay the losses in cases of captures and condemnations, whether by English cruizers or others.||

have been enforced, it makes no difference that in fact such insurances are frequent, and always paid without objection.^(t) If the neglect complained of be, that by the non-communication of a material fact to the underwriters, in making the insurance, the policy was avoided, the agent may make it appear, by way of defence, that the fact, if communicated, would have made it impossible to get insurance at the premium limited in his instructions. Thus a shipowner in London directed a broker at Hull to insure a ship, then on a voyage from London to Hull, *limiting the premium to be given*, and communicating the day of the ship's sailing from London. The broker effected the policy without any delay, but concealed the day of the ship's departure. Upon that ground, the assured having been nonsuited in an action brought upon the policy, brought another action against the broker for neglecting to make the *proper communication, in [*21] which the latter was permitted to show in his defence, that no insurance could have been made at the limited premium, if the date of the ship's departure had been communicated, that date being such as would have made her be considered a missing ship at the time the order was received.^(u)⁽⁷⁾

If the agent do all that is usually done to get the insurance effected, it is sufficient. For he is no insurer, and not bound to procure insurance at all events.^(v) Accordingly, where an agent, having ineffectually endeavored to get an insurance at the usual places, was obliged to employ another person, who got it done, but refused to give up the policy, and became insolvent after receiving the money from the underwriters, the first agent was held to

(t) *Webster v. DeTastet*, 7 T. R. 157.

(u) *Anon. cor. Chambre*, J. York Summer Ass. 1808.

(7) † The case of an insurance broker is here put as an illustration, for there is no doubt that the same or a like defence would be open to a factor or correspondent who had the charge of goods.‡

(v) *Smith v. Cologan*, 2 T. R. 188, note.

be discharged, for it was not incumbent upon him to bring an action for the detention of the policy.^(w) Upon the same principle, if the employer desire to have the insurance made at any certain office, in preference to others, must express it in his instructions : for under a [*22] general order, an agent is justified in *applying to all of the accustomed and reputed offices, though, from the nature of the commodity to be insured, a greater sum may be covered for the same premium by some, than by others. offices.^(x)

The policy may be effected by the agent in his own name ;^(A) and it is not necessary that he should be described in it "as agent."^(y) It is, however, necessary, if the name of the agent only be inserted, that he should appear in evidence, (and it is usually so averred in the declaration,) to come within one of the following descriptions in the statute 28 Geo. III. c. 56, viz. either the consignee or the person residing in Great Britain, who shall receive the order for, and effect the insurance ; or the party giving the order to the person immediately employed.^(z) It is sufficient compliance with this act, that the name of the broker employed by the consignees to effect the insurance be inserted in the policy.^(a) Also, where upon the refusal of the consignee of a cargo to receive it, a general agent of this country] of the owner who resided abroad, took himself, without any instructions, to insure it [*23] in his own name, which was approved by the owner

^(w) *Smith v. Cologan*, 2 T. R. 188, note.

^(x) *Moore v. Morgue*, Cowp. 479 ; *Comber v. Anderson*, 1 Camp.

^(A) || *De Forest v. The Fulton Fire Ins. Co.* 1 Hall, 122, 126, 1

^(y) *Bell v. Gilson*, 1 B. & P. 346, note ; *De Vignier v. Sanson* 19. (*Mellish v. Bell*, 15 East, 4.) || The action upon the policy brought either by the principal or the agent, in his own name 362.||

^(z) 28 Geo. III. c. 56.

^(a) *Bell v. Gilson*, 1 B. & P. 345.

notice of it, the policy was deemed sufficient within this act.(b)(8)

(b) *Lucena v. Crawford*, 2 Bos. & Pul. N. R. 291. || As the law antecedent to the statute of 28 Geo. III., the reasons for passing that statute, and its general construction tend materially to explain the statements in the text, the editor extracts the following passage from the 3d volume of Stephens' *Nisi Prius*, pp. 2094, 5 :—" Formerly it was customary for the broker to produce the policy in blank to the underwriters, who signed it without seeing more than a short memorandum endorsed on it, and the broker afterwards filled it up at his leisure.

" This practice having been attended with essential mischiefs, induced the legislature to enact statute 25, Geo. 3, c. 44, by which it was directed, that where the insured resided in Great Britain, his name, or that of his agent should be inserted in the policy as the person interested ; and where he resided abroad, the name of his agent should be inserted.

" It was adjudged under the foregoing statute to be requisite, that the agent's name should be inserted *eo nomine*, as agent, and that if the principal were abroad, the agent, in whose name the insurance was made, must be resident in England, (*Pray v. Edie*, 1 T. R. 313 ;) and that the names of all the persons interested must be inserted. (*Willton v. Reaston*, Park on Ins. 20.)

" This state of the law being unsatisfactory, stat. 25, Geo. 3, c. 44, was repealed by stat. 28, Geo. 3, c. 56, by which it was enacted, that no policy should be made on any ship or goods without inserting therein the name or names, or the firm of dealing, of one or more of the persons interested in such assurance ; or the name of the consignor or consignee, or of the person residing in Great Britain who should receive or give the order for such policy ; and that policies made contrary thereto should be void.

" Upon the construction of this statute it has been holden, that it should not be taken in its strict literal sense, ' but ought,' as observed by Mr. Justice Buller, (*Wolf v. Horncastle*, 1 B. & P. 316,) ' to receive the most liberal construction that the words will bear ; and, therefore, if bills of exchange drawn on the consignee of a cargo of goods for the amount of them, be sent, together with bills of lading, by the consignor to his general agent, with directions to deliver the bills of lading to the consignee on his accepting the bills of exchange—and the consignee refuse to receive the goods, or to accept the bills of exchange, the agent becomes in effect the consignee within the meaning of the statute, and may insure the goods as agent for the consignor, or in his own right, if he have accepted bills on the credit of the goods.' (Ibid.)"

(8) ‡ " To make a man an agent in such a case, he must either have express directions from the principal to cause the insurance to be effected, or else it must be a duty, arising from the nature of his correspondence with the principal. And no general authority which he may have in relation to

The policy, when effected, becomes the property of the insured ; and, if wrongfully withheld by the agent, an action of trover lies for it. And though no policy had in reality been effected, yet the broker, having represented to the principal that it had, was not allowed, in an action of trover for the policy, to contradict that representation, (though alleged to be made by mistake of his clerk,) in order to let in the objection, that trover could not be maintained for that which had never existed.(c)

SECTION 5.

Where duties are payable upon the importation or exportation of goods, it is the business of the factor or agent employed in the receipt or dispatch of them, to take care that the proper entries are made, and the duties satisfied. For if, by reason of a false or imperfect entry,(a) or by being landed before customs are paid or compounded,(b) the goods be forfeited, the factor is liable to answer for the loss,(c) unless, indeed, the entry be pursuant to the invoice, or letters of advice, for then it is not his fault.(d)

a ship or goods will make him an agent for the purpose of insuring the parties interested. Therefore a ship's husband, regularly appointed and executed by all the owners, with power to advance, lend, &c. to make payments, and to retain all claims, &c. has no right to make insurance on all or any of the part owners without a general direction from all, or a particular direction from each." Marsh. Ins. 3d ed. 303.† || Post, 108.

(c) *Harding v. Carter*, Park, 4 ; ‡ *Ticel v. Short*, 2 Ves. 229.†

(a) *Lewson v. Kirk*, Cro. Jac. 255 ; Cha. Ca. 25.

(b) 4 Bac. Ab. 599, tit. Merchant, B.

(c) *Lewson v. Kirk*, Cro. Jac. 255.

(d) Moll. 329. || The *onus probandi* in such cases is thrown upon the factor. So, the Supreme Court of Massachusetts held, that a factor from a foreign country, from whom property consigned to him is taken for a sale, in violation of the revenue laws of the country, must nevertheless account for the property, unless he can show that in the management of it he conformed to the laws of the country.

The extent of this liability is said by *Malynes* to be that of the *cost* price of merchandize to be exported, or the *sale* price of that which is to be imported, with reference to the country where the seizure is made.(e)

It is in consideration of this responsibility, that it has been thought that the factor is entitled to charge foreign customs as paid, and to have the benefit to himself, if he can find means to evade the payment of them ; but not so of home customs.(f) This opinion, however, has been treated as questionable.(g)(1)

*SECTION 6.

[*25]

To consider, in the next place, the duty of agents, in respect to contracts made by their intervention, it is necessary to premise, that contracts of this description give rise to two questions, which must be kept wholly distinct, viz. 1st, as between the principal and agent, whether the latter have faithfully discharged his duty ; 2dly, between the principal and the third persons, whether the contracts be binding upon him ; for many cases occur where a principal is obliged by acts not done pursuant to his authority.(a) The first only is the subject of our present consideration.

the laws of such country ; or that he was authorized by special instructions from his principal to act as he did ; or that the property could not be managed in any other manner than that in which he attempted to manage it ; and that this was a fact known to his principal when he made the consignment. *Wellman v. Nutting*, 3 Mass. Rep. 434.||

(e) *Mal. Lex. Merc.* 83 ; 13 *Vin. Ab.* 4.

(f) *Smith v. Oxenden*, and *Borr v. Vandall*, *Eq. Ca. Abr.* 369, 370 ; *Boulton v. Arlson*, 3 *Salk.* 235 ; but Lord Keeper North disapproved the doctrine altogether ; 13 *Vin.* 4.

(g) 13 *Vin. Ab.* 3, see post.

(1) ‡ And surely is insupportable, see post, ‡ || 107, n. a.||

(a) *Runquist v. Ditchell*, 3 *Esp. Cas.* 64 ; || *Pickering v. Busk*, 15 *East*,

And, first, of the contract of sale. † An agent must strictly pursue his authority ; and therefore a factor authorized to sell has no right to barter.(1) As for the price,† if none be limited by the instructions, it should be the agent's endeavor to obtain the best which the thing sold is fairly worth and to this end he is bound to exert that degree of vigilance and intelligence, which might be expected from a prudent person in the management of his own business.(b)

If, however, a price be fixed, from which he [*26] *not at liberty to depart, he will not be justified in selling for a less,(c) unless, as in the case already mentioned, where the mode of sale directed to be used would make a secret limitation of the price a fraud upon purchasers.(c)

2. It seems to have been formerly thought, that a factor or agent, by virtue of a general commission to sell, was justified in selling upon trust.(d) But whatever may have been the law formerly, it is now settled, agreeably to principle which governs every part of an agent's duty, the usage of trade affords the true rule in this respect. The law is thus stated by Lord Chief Justice Holt :
 A factor of common right is to sell for ready money : but if he be a factor in a sort of dealing or trade, where the usage is for factors to sell upon credit, there, if he sell to a person of good credit at the time, and he afterwards become insolvent

38 ; *Withington v. Herring*, 5 Bing. 442 ; post, 196, 200 ; *Munn v. Shadwell*, 15 John. Rep. 44 ; *Andrews v. Gurney*, 6 Cowen, 354. There may be cases in which the principal, to protect himself from liability, should make known to persons dealing with the agent, the limitations of his authority. *Perkins v. The Washington Co.* 4 Cowen, 645-663.||

(1) † *Guerreiro v. Peile*, 3 B. & A. 616.† || Post, 213.||

(b) *Beawes*, 43.

(c) *Bexwell v. Christie*, Cowp. 395. || Ante, 8.||

(d) *Barton v. Saddocks*, 1 Bulst. 104 ; *Anon.* 2 Mod. 100.

(e) *Scott v. Surman*, Willes, 407 ; *Houghton v. Matthews*, 3 Pull. 489. || Ante, 5, n. post, 212.||

vent, the factor is discharged ; but otherwise, if it be to a man notoriously discredited at the time of the sale. (f) But if there be no such usage, and he upon a general authority sell upon trust, let the vendee be ever so able, the factor only is chargeable." (g) This doctrine will [*27] be more fully considered in discussing the obligation of contracts made by agents. (A)

(f) *Anon.* 12 Mod. 614 ; per Holt, C. J. ; *Dodridge v. Anthony*, Winch. 53 ; *Capp & Tucker's case*, 2 Roll. 497 ; and see *Wiltshire v. Sims*, 1 Campb. 258, and Dy. 29, a.

(g) See note (f), preceding page.

(A) ¶ *McKinstry v. Pearsall*, 3 Johns. Rep. 319 ; *Van Allen v. Vanderpool*, 6 Johns. Rep. 69 ; *Leverick v. Meigs*, 1 Cowen, 645 ; *Burrill v. Phillips*, 1 Gallis. 360 ; *Forrestier v. Bordman*, 1 Story's Rep. 43 ; *Goodenow v. Tyler*, 7 Mass. Rep. 36 ; post, 198, 212. It would seem from some of the cases that the right of the factor to sell upon credit, was absolute and not dependent upon usage. *Van Allen v. Vanderpool* ; and *Goodenow v. Tyler*, ubi supra ; *Robertson v. Livingston*, 5 Cowen, 474. So, Mr. Justice Story says : (Agency, § 206) " the right of a factor to sell upon credit, although formerly a matter of fact and usage, and to be ascertained as such, is now treated as an undeniable principle of law, and incidental to the agency, in the absence of all contradictory proofs." But see Story's Agency, § 60, 200, 226 ; and the charge of the learned commentator, in *Forrestier v. Bordman*, 1 Story's Rep. 53. However, in the case just cited, the question was, as to usage in a foreign country. As to this point, Mr. Chancellor Kent says : (2 Comm. 622.) " A factor or merchant who buys or sells upon commission, or as agent for others, for a certain allowance, may, under certain circumstances, sell on credit, without any special authority for that purpose, though as a general rule an agent for sale must sell for cash, unless he has express authority to sell on credit. He may sell in the usual way, and, consequently, it is implied that he may sell on credit without incurring risk, provided it be the usage of the trade at the place, and he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser." Mr. Livermore says : (Agency, vol. 1. p. 127,) " But as this authority to sell upon credit is implied from usage, so also it is to be controlled from usage ; and therefore a factor, or broker, is not authorized to sell goods upon credit, which are usually sold for cash." The case there referred to, is of a sale of stock ; as to which see post, 212. And see what is said as to usages of trade, ante, p. 5.

A question may arise, as to what shall be deemed a sale for cash, or on credit, the solution of which will, in like manner, be referred to usage.

But, notwithstanding any usage of trade, an agent is not warranted in selling upon a credit to a person whom he knows at the time to be insolvent, unless specially directed to sell to him.^(h) The notorious discredit of the vendee, as appears from the opinion just cited of Lord C. Holt, is a reason for charging the agent.⁽ⁱ⁾ And if he sells goods of his own to the same person for ready money, this is a strong circumstance from which to argue his know-

Thus, it appeared on the trial of this case, that the plaintiff sent several boxes of lemons and oranges from Boston to the defendants at New York with directions to sell them for cash. The defendants sold the fruit to a person in good credit, and on the same day wrote to the plaintiff that they had received and sold the fruit, and that "the money was payable next week." The defendants sent in their bill the next day for payment, but the purchaser had in the morning discovered signs of alienation of mind, and his disorder increased during the day. He became quite insane the next day after, and so continued until his death. A part of the bill, however, was paid by a person acting on his behalf, and the money had been received by the plaintiff. The action was brought to recover the balance. A question arose, whether this was a sale for cash; and the defendants introduced evidence to show, that both at Boston and at New York, when orders are received to sell goods for cash, although the seller has a right to demand the cash on the delivery of the goods, it is nevertheless usual, if the purchaser is in good credit, to deliver the goods, and send in the bill for payment the next day, or within two or three days, and that this is the understanding of merchants, would be a sale for cash.—Parker, C. J., instructed the jury, that if they believed the witnesses as to the usage, and that the purchaser was in good credit at the time, there was no breach of order in the manner of the sale. A verdict having been rendered for the defendants, a new trial was refused. The court said: "Upon the evidence of usage, which was properly admitted, the jury have found that this was a cash sale; and it would embarrass business very much if it were not so considered. The defendants did not intend to allow the purchaser to have the goods for any length of time. They might have sued him immediately after the delivery of the fruit. Such a sale is no violation of orders to sell for cash, unless it is made to a person in insolvent circumstances; which is not the case here. The letter of the defendants does not mean that they trusted the purchaser for a week, but that the money would be collected at that time." *Clark v. Van Northwick*, 1 Pick. 343.¶

(h) *Yelv.* 202; *Sadock v. Burton*, *Malyne*, 83.

(i) 12 *Mod.* 614, ante, (f)

ledge of the vendee's insolvency, though it is said not to be sufficient alone to charge him in an action.(j)

The time of credit must, in all cases, be reasonable and customary ;(k) and the security such as the principal may avail himself of by reasonable diligence, and without extraordinary risk or trouble.(l)

3. When the contract for sale is concluded, the principal ought regularly to have notice of it. It is alleged by Malyne, that if the factor have not given notice to his principal of the bargain in "convenient time, and [*28] the vendee become insolvent, the factor is responsible.(m)

If payment be made to an agent resident in a foreign country by bad money, the loss, it is said, falls upon him ; but it is otherwise if he take in payment money which is afterwards depreciated by edict or proclamation.(n)

It will be seen more at large, in a subsequent part, under what circumstances an agent is discharged by depositing the money received on the sale, in hands which happen to fail.(o)

(j) Moll. 239.

(k) Bulstr. 103 ; *Barton v. Saddocks*, Moll. 328.

(l) Bulstr. 104 ; *Barton v. Saddocks*, Yelv. 202 ; Winch. 53.

(m) 13 Vin. Ab. 4 ; Beawes, 43. ¶ *Forrestier v. Bordman*, 1 Story's Rep. 44. Where an agent sells the goods of his principal on credit, taking a note for the price, gives notice of the sale to his principal, and credits him in account with the amount of it, but omits to give notice of the non-payment of the note at maturity, the agent becomes responsible for the whole amount of the debt, and it is not necessary to enable the principal to recover, that he should prove that he has sustained any damage. The omission to give reasonable notice makes the agent an insurer of the solvency of the purchaser. *Harvey v. Turner*, 4 Rawle, 223 ; *Brown v. Arrott*, 1 Miles' (District Ct. of Pha.) Rep. 139.¶

(n) Moll. 424.

(o) Post, ¶ p. 45-46.¶

SECTION 7.

We come now to treat of purchases made by agents.— It is laid down by the writers upon commercial law, that if a factor, in the execution of a commission to purchase, deviate from his orders in price, quality, or kind; or if after they are bought, he send them to a different place from what he was directed, they must remain to his own account, except the merchant, on advice, admit them according to his first intention.^(a) And it appears from the following case,^(b) which also confirms the rule just mentioned, that the principal, *if he have advanced* [*29] *money upon the goods,* *is not obliged, in rejectin

(a) *Malyne*, 82; *Beawes*, 43; 13 Vin. Ab. 6. ¶ A factor undertaking to make a purchase for his principal cannot impose upon him terms, unusual in their transactions, as a condition for the delivery of the goods. If he should have declined the commission; and if after the purchase, and before the acquiescence of the principal in the condition, and the delivery of the goods to him, they are destroyed, the loss falls upon the factor. And where orders are given to a factor in New York, to purchase at an extended credit and to forward goods of a particular description to the principal in Alabama, and from the character of the market for which they are intended, it is important that they should be delivered forthwith; and the purchase is made and the goods forwarded to a correspondent of the factor with instructions not to deliver them to the principal until paid for in cash or approved paper given payable in ninety days, when the factor had purchased at a credit of six months such not being the usual course of business between the parties, and the solvency of the principal not being impeached—and the goods after arrival in Alabama, and before delivery, consumed by fire while in the possession of the correspondent of the factor the loss falls upon the *factor*, and not upon the *principal*. Sutherland said: “the plaintiff in undertaking to exact immediate payment, and refusing to deliver the goods until paid for, if he intended to be considered factor or agent in the transaction, violated his instructions, and made the goods his own; he became in fact a vendor offering terms of sale.” *Williams v. Littlefield*, 12 Wend. 362. As to waiver by principal of the violation, see post, 31. As to ratification by principal of unauthorized act of agent, see post, 171, *et seq.*¶

(b) *Cornwall v. Wilson*, 1 Ves. 509.

the contract, to return them into his agent's hands, but may [take upon himself to] dispose of them *as agent for the latter*. The defendant, a merchant in London, gave orders to the plaintiffs, his factors at Riga, to buy hemp at a limited price ; the plaintiffs exceeded that price, and the hemp coming to England, the defendant refused the contract, but, however, disposed of the hemp. The question was, in what manner the defendant should account to the plaintiffs ; whether for the whole price paid by them, or only for so much as the hemp sold for. Lord Hardwicke, in his judgment, expressed himself thus : " The defendant insists, that the plaintiffs having exceeded their orders as factors, in which they are not warranted, he is justified in refusing the contract, and turning it on the plaintiffs themselves, making them principals ; to prove which, merchants have been examined on both sides, and the result is, that if a factor have not a general, but a limited authority, to purchase at a certain price, if he exceed that, his principal is not bound to adopt the contract, and accept the goods, and reason agrees therewith." And afterwards, " it is very true and reasonable that a merchant here, refusing the goods sent over by his factor in a foreign country, who exceeds his authority, *having advanced his money on those goods*, may act thereon as a factor for that person who broke his orders."

2. This, it will be observed, was the case of a *factor resident abroad, which differs materially [*30] from one in which the residence of the parties would admit of the goods being instantly returned without great injury. The following opinion, declared by Lord Eldon, seems to afford a safe guide upon this subject : " That if a man, under a contract to supply one article, supplies another, under such circumstances that the party to whom it is supplied must remain in utter ignorance of the change till the goods are in a situation in which it would be against the interest of the other to return or reject them, instead of doing what is best for him, namely, selling them immediately, a jury would have no hesitation

in saying, that he may be considered, if he please, not a purchaser, but as placed by the vendor in a situation which, acting prudently for him, he might be looked upon as his agent.”(c) And again it is stated by the same authority, as a general principle, “that where there is a contract of sale and delivery, and the goods might, from the nature of the contract, be re-delivered, if, under the circumstances, they cannot be re-delivered, an equity arises from this, namely, that the party cannot protect himself at law, as he cannot re-deliver, and he was led into that by a misrepresentation of the other.”(d)(1)

[*31] *3. But if the principal elect to proceed in the same manner, he must, from the first, decisively reject the contract, for he will not be allowed, after endeavoring to turn the goods to account, to return them upon the vendor’s hands.(A) Therefore, in the case already quoted, the principal, though he had expressly, by letter disaffirmed the contract, yet, having shipped the goods on a new vessel instead of disposing of them in London, where it was proved there was a market for them, he was held to have waived the right of disowning them, and was decreed to account with the factor for the whole price.(e) † And

(c) *Kemp v. Prior*, 7 Ves. Jun. 240.

(d) *Id. ib.* 242.

(1) † It may be necessary to explain this dictum. The question was, whether a court of equity could interfere, the subject matter being properly cognizable by a court of law. Lord Eldon therefore said, “A court of law could not give relief, because at law, to make the rejection of the principal complete, it ought to be shown that the goods were re-delivered. Now the goods could not, in this case, have been re-delivered, without great loss, to the agent himself; and hence there is an equity on behalf of the principal, that he, for the sake of the agent himself, not having re-delivered, but having taken upon him to answer for the agent in disposing of the goods, shall not be a sufferer by the agent’s conduct, but shall stand, as to the fact of rejection, on the same ground as if he had actually re-delivered them.”†

(A) || *Post*, 114, 115, 171.||

(e) *Cornwall v. Wilson*, 1 Ves. 509. || The defendants, merchants of Baltimore, consigned the ship *Henry Clay*, and cargo to the plaintiffs, merchants in Amsterdam, with instructions to them respecting her ulterior destination, which showed, that on the failure of getting a freight to Ba-

all cases of a departure from instructions, || or acting without, or contrary to instructions, || the principal is bound to notify his rejection to the factor or his agent *within a reasonable time* after intelligence received of the purchase, otherwise he will be presumed to have adopted the transaction, and the loss, if any, will fall upon him.(2)

or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russian goods for the United States, but with instructions to the master, committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold at Amsterdam for the price limited; and the plaintiffs purchased in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of the defendants, and partly with money advanced by themselves. On the return of the vessel to Baltimore, the defendants objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to the plaintiffs of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. In an action of *assumpsit* to recover the moneys advanced by the plaintiffs, the defendants claimed a deduction for the loss which might have arisen from the breaking up of the intended voyage to St. Petersburg. On a division of opinion in the Circuit Court for the district of Maryland, the Supreme Court of the United States, certified their opinion, "that the plaintiffs have a demand in law against the defendants, which can be maintained in the action now depending in the Circuit Court, and that the defendants are not entitled to a deduction from the same for the amount of any loss which may have been sustained by them by reason of the alteration in the destination of the ship *Henry Clay* to St. Petersburg and the loading of her at Amsterdam." In delivering the opinion of the court, Marshall, C. J. said: "The defendants having received the cargo of the *Henry Clay* and sold it, are accountable for the proceeds, although the cargo should be considered as the property of the plaintiffs." And again; "were it possible, that the Messrs. Willinks could be made responsible in any form of action which could be devised, for the possible loss resulting from the breaking up of the voyage to St. Petersburg, they cannot, we think, be made responsible in this. Having loaded the *Henry Clay* at Amsterdam, clearly without authority, the cargo was shipped at their risk. The defendants might have refused it altogether. But they have sold it and received the money. This creates an *assumpsit* to pay the money received." *Willinks v. Hollingsworth*, 6 Wheat. 240.||

(2) † *Prince v. Clark*, 1 B. & C. 186; ‡ || *Pratt v. Putnam*, 13 Mass. Rep. 363; *Cairnes v. Bleecker*, 12 Johns. Rep. 300; *Vianna v. Barclay*, 3

4. The above case of *Kemp v. Prior* also furnishes [*32] us with Lord Hardwicke's opinion upon another

Cowen, 281 ; *Frothingham v. Haley*, 3 Mass. Rep. 70 ; *Clement v. Jones*, 12 Mass. Rep. 64 ; *Shaw v. Nudd*, 8 Pick. 9 ; *Benedict v. Smith*, 10 Pick. 130 ; post, 172, n. (g) ; *Bell v. Cunningham*, 3 Peters, 69, 81 ; *Breese v. Dubarry*, 14 Serg. & Rawle, 30. In *assumpsit*, the facts were, that the plaintiffs had consigned to the defendants who were merchants at New Orleans, sundry cotton goods for sale, with orders not to sell the same at a price below eighteen cents per yard. The defendants kept the goods in hand a considerable time, being unable to sell them at the limits ; and finally, without receiving any other orders, sold the goods at prices below the limits ; and sent a letter to the plaintiffs informing them of the sales and prices, enclosing also an account current, at the prices sold for, stating the balance in their hands and authorizing the plaintiffs to draw for it. The letter and enclosures were duly received by the plaintiffs, who wrote a letter in reply. They afterwards drew, at different times, bills for part of the balance, and finally for the residue. These bills were duly paid. There was no intimation in any of these letters, that the defendants had done wrong ; no complaint was made of the sales ; and no objection suggested against the account. The action was brought for the difference between eighteen cents, and the prices at which the goods were sold, and judgment was rendered for the defendants. Story, J. said : " The conduct of the plaintiffs amounted to a full ratification of the sales by the defendants. It was their duty, upon receiving the letter and account of sales, to have expressed their dissatisfaction within a reasonable time. So far from so doing, they have repeatedly written since, without the slightest complaint, and drawn for the whole balance. This is a complete acquiescence in the sales of the defendants. It amounts to a virtual adoption of the sale. A subsequent confirmation is equivalent to an original authority. If a merchant neglects, after a reasonable time, to object to an account current, he is deemed to acquiesce in it ; and it is treated as an account stated." *Rimond Manufacturing Co. v. Starks*, 4 Mason, 296.

Mr. Livermore, (1 Pr. & Ag. 50,) says : " When the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter, informing him what has been done on his account." He then proceeds : " But when the person doing the business is a mere volunteer, who has officiously interfered in the affairs of another person and has effected an insurance, made a purchase for him, without any color of authority, I do not conceive that the other person is bound to answer a letter from the intermeddler, informing him of the contracts so made in his name, nor that the silence can be construed into a ratification. Certainly no case has gone this long

point material to this question. It seems to be there intimated, that if the exceeding in price be for the purpose of effecting, and do effect an equal saving upon the same goods in some other respect in which the factor was not limited, in equity the principal is bound to take them. The order was given to a foreign factor to purchase hemp at a certain limited price, but without any directions as to the freight. It happened that the price of the freight was rising more than the price of hemp was falling, which induced the factor, instead of waiting till the article fell to the price limited, to purchase somewhat higher than his orders, and ship immediately, in order to profit by the then lowness of the freight, thereby, as it appeared, saving more in the freight than the excess of price ; and Lord Hardwicke said

and the opinion of the great *Cujas* is, that this is no ratification." If, as Mr. Justice Story conjectures, the passage of *Cujas* alluded to, be the one he has himself cited, (Agency, § 257 n.) it does not bear out Mr. Livermore's position ; (unquestionable as it is ;) and in § 258, he states his own view in these words : " Even if no such prior relation of principal and agent, has existed between the parties ; yet, if a party, who has acted for another, gives notice thereof to the principal, and the latter makes no reply, or no objection, it will, in many cases, afford a presumption, that he ratifies the act." Yet the learned commentator does not appear to be fully satisfied with the doctrine, as he has laid it down in his text. In a note, (the language of which is somewhat equivocal,) after referring to the foregoing quotation from Livermore, he subjoins : " Perhaps, in cases of the intermeddling of mere strangers, it would be difficult to find any complete authority for so broad a position, as that the principal would, in all cases, be bound to answer the person, who assumed to be his agent, and, if he did not, his silence should be construed into a ratification ; and the doctrine of the Roman law, as to a *negotiorum gestor*, is unfavorable to it. But on the other hand, it would be difficult to say, that his silence ought in no case to be construed as a ratification. If the act is *bona fide* done for the apparent benefit of the principal, it would be harsh to say, that its being done by a stranger does not entitle him to the benefit of the silence of the principal, as a presumptive ratification, where he has had full notice of the act, and has done nothing to repudiate it." It is, however, a very familiar principle that *assumpsit* will not lie upon a past or executed consideration, without showing a previous request by the party promising : " for it is not reasonable that one man should do another a kindness and then charge him with a recompence." Bac. Abr. Assumpsit, D. ; 1 Stephens N. P. 243.||

he was inclined to think, that if the case had stood si upon this state of facts, the factor did right.(f)

If a factor buy a commodity which afterwards beco damnified, he is not answerable for the loss. But, ac ing to Malyne, "if the commodity were *damnified* be then he is to bear some part of the loss, though it ha ed to be known afterwards."(g)(2)

[*33] *It is a fundamental rule, applicable to both and purchases, that an agent employed to sell not make himself the purchaser;(h) nor, if employ

(f) *Cornwall v. Wilson*, 1 Ves. 509; || post, 115; *Parkhill v.* 15 Wend. 431-434;||

(g) Malyne, 84.

(2) † Would not this rather depend on the question whether he exercised due skill and caution in the purchase of the commodity? *Iwaring v. Brandon*, 8 Taunt. 202; the defendants had been empl brokers by the plaintiff, who was the foreign factor of a house in l to purchase tobacco in the foreign market. The tobacco was bou shipped to Holland, but on arrival was found to be so bad, that th house sued the plaintiff, and recovered damages. The plaintiff th brought his action against the defendants; and it having been pr the trial that the tobacco might have been discovered on inspectio time of sale, to be altogether unmarketable, he was allowed to rec whole amount of damages and costs which had been obtained agai returning, of course, the tobacco to the defendants.†

(h) *Lowther v. Lowther*, 13 Ves. 103. By 31 G. II. c. 40, s. 1 men, brokers or factors employed to buy or sell cattle in London, hibited from buying or selling on their own account, under penalty of their value. || The master of a vessel, which was stranded, caused sold at public auction, and became himself the purchaser through instrumentality, as may be inferred from the statement of facts in t of the case, of a third person. The vessel was afterwards got off material injury. In an action brought by the owner on a policy ance, in which it was held that he could not recover for a total los J. said:—"The sale in this case was made by the master, or unde mediate direction, and nothing can be clearer than that, at such could not become a purchaser. He cannot be at once vendor and The sale was merely an amicable sale, and the whole property on account of the master; or it was a *bona fide* sale, which the declined to enforce, and released all his right acquired by the sa master. In either case, it is a void or ineffectual sale. Nothing better settled, than that an agent or trustee cannot, directly or i

become the purchaser of the trust property, which is confided to his care. The law will not suffer any man to earn a profit, or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at public or private sale. This case then stands before the court, as if there was no sale; the ownership has never been legally divested, and the ship was, at the time of the abandonment, in good safety. There was no foundation upon which to rest the claim for a total loss." *Church v. Marine Ins. Co.* 1 Mason, 341. So, Walworth, Ch. says:—"The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence, with reference to the subject of purchase, is not, as the defendant supposes, confined to trustees, or others who hold the legal estate to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees, or solicitors. But it is a rule which applies universally to all who come within its principle; which principle is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, when he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use." *Van Epps v. Van Epps*, 9 Paige, 241. "A sub-agent is just as much disqualified as an agent is to make a purchase in opposition to the rights and interest of his principal." Story, *J. Baker v. Whiting*, 1 Story's Rep. 241. And see, as to the general principle, *Lees v. Nuttall*, 1 Russ. & M. 53; S. C. 2 Myl. & K. 819; Taml. 282; *Taylor v. Salmon*, 4 Myl. & Cr. 139; *Wormley v. Wormley*, 8 Wheat. 421; *Green v. Winter*, 1 Johns. Ch. Rep. 26; *Parkist v. Alexander*, id. 394; *Davoue v. Fanning*, 2 Johns. Ch. Rep. 252, 266; *Stiles v. Burch*, 5 Paige, 132; *Reed v. Warner*, id. 650; *Jackson v. Van Dalsen*, 5 Johns. Rep. 48; *Torrey v. Bank of Orleans*, 9 Paige, 650, 663; *Hawley v. Cramer*, 4 Cowen, 718; *Gallatian v. Cunningham*, 8 Cowen, 362; S. C. Hopkins, 48; *Woodruff v. Cook*, 2 Edw. Ch. Rep. 264; *Barker v. Marine Ins. Co.* 2 Mason, 369; *The Schooner Tilton*, 5 Mason, 480; *Baker v. Whiting*, 3 Sumner, 476; *Copeland v. Mercantile Ins. Co.* 6 Pick. 204; *Campbel v. Pennsylvania Ins. Co.* 2 Wharton, 64; *Bartholemew v. Leach*, 7 Watts, 472; *McCluskey v. Webb*, 4 Robinson's (Louisiana) Rep. 202; Lloyd & G. 76, note; *Cram v. Mitchell*, 1 Sandford's Ch. Rep. 251; *Church v. Sterling*, 16 Conn. Rep. 400. It would be easy to accumulate authorities on the doctrine; but the above are sufficient to show that the principle is inflexible. Whatever distinction may be taken in some cases, (*Executors of Drayton v. Drayton*, 1 Desau. 567; *McKay v. Young*, 4 Hen. & Munf. 430; *Hudson v. Hudson's Adm'r*, 5 Munf. 180,) between a sale at auction and a private sale, it is certainly not founded on the established rules of courts of equity. What difference does it make whether the agent or trustee, sell directly to himself, or cause the sale to be made, through an intervention over which he has the entire control? *Davoue v. Fanning*, 2 Johns. Ch. Rep. 259; 1 Story's Eq. Jurisp. § 322.]]

purchase, can he be himself the seller.(i) The expediency and justice of this rule are too obvious to require explanation. For with whatever fairness he may deal between himself and his employer, yet he is no longer that which service requires, and his principal supposes and retains him to be,—he acts not as an agent, but as an umpire.(3)

therefore, a purchase by an agent employed to :
 [*34] can in any *case be supported, it must be where the agent makes it fully to appear both that he furnished his employer with all the knowledge which he himself possessed,(k) and also that he was known to be

(i) Post, ¶ 37.¶

(3) ¶ See *Gillett v. Peppercorne*, 3 Beav. 78–83, of which case a statement will be found post, 37, note.¶ † And on the same ground manifest inconsistency, neither party to a contract can be recognized doing any act necessary to the validity of that contract in the character of agent to the other party. See *Wright v. Dannah*, 2 Campb. 203 ; *L v. Bromfield*, 2 Chitty's Rep. 205.‡ ¶ Post, 160, note 7. The agent or seller cannot become the agent of the purchaser in the same transaction. Story's Ag. § 211. So, Morton, J. says :—" It is a rule of law well settled and founded on the clearest principles of justice and sound policy, that the agent of the seller cannot become the purchaser or the agent of the purchaser. These relations are utterly incompatible with each other." *Copeland v. Cantile Ins. Co.* 6 Pick. 204. Mr. Lloyd, in his note, has not developed the principle to the full extent to which he probably intended it to be understood, and in which it was understood by the authorities just referred to. And see *Florance v. Adams*, 2 Robinson's (Louisiana) Rep. 556, where it is said :—" There is no principle better settled than that the same person cannot be the agent of two contracting parties in the same transaction when their interests are in conflict ; still less can he act as such, when he has in the matter a personal interest adverse to one of the parties. The transfer of a note is a contract, and therefore the making of it requires the concurrence of two minds (*aggregatio mentium*.) Here there was no natural person acting as transferrer and transferee. No agreement could be formed, and, therefore, no transfer took place." So, a person incapacitated from purchasing on his own account, cannot buy as agent for a third person ; and it seems to have been the opinion of Lord Mansfield, though the point was not expressly decided by him, that he cannot, as agent for a third person, employ another to bid. *Ex parte Bennett*, 10 Ves. 1 Liv. Pr. & Ag. 425.¶

(k) *Lowther v. Lowther*, 13 Ves. 103 ; *Wren v. Kirton*, 8 Ves. 50 post, p. 37, (n.) ¶ *Hawley v. Cramer*, 4 Cowen, 717, 741 ; *Baker v.*

ting, 3 Sumner, 476 ; *Lord Selsey v. Rhoades*, 2 Sim. & Stu. 41, 49 ; *Phillips v. Belden*, 2 Edw. Ch. Rep. 15. The doctrine on this subject is stated, enforced and applied by Parker, C. J. in a very able opinion delivered by him, on behalf of the Supreme Court of Massachusetts, in a case in equity. He says :—"According to the general current of authorities, any one standing in the relation of trustee, or *quæ* trustee, as agent, factor, steward, &c. if he would purchase of his principal or employer any estate or property committed to his care, must deal with the utmost fairness, and conceal nothing within his own knowledge which may affect the price or value ; and if he does, the bargain shall be set aside. It is not easy to extract any precise rule, as to setting aside contracts on the ground of constructive fraud, from the numerous decisions in chancery upon this subject. There are considerable shades of difference in the manner of stating the rule or principle by different judges of the chancery courts, leaving it much to be apprehended, that instead of a general rule applicable to all cases of a like general character, the features of each case have formed a rule for itself, thus opening that broad discretion, which, however it may be disavowed, is practically exercised, and perhaps necessarily so, by courts of equity. It is stated by an eminent chancellor, that there is no head of equity more difficult of application than the avoidance of a contract on the ground that advantage has been taken of distress ; but generally speaking, there can be no title to relief where the advantage or disadvantage of the contract depended upon subsequent contingencies, the result of which must have been equally uncertain to each party at the time of the contract. It is added, that it is a general and most material rule in all cases of accounts, that where there has been a settlement, and the account has either been signed, or a security executed at the foot of it, a court of equity will not open that transaction, unless the evidence produced, (founded on the charges in the bill,) shows the transaction to be so iniquitous, that it ought not to be brought forward at all to affect the party sought to be bound. Some principles however may be extracted from the decisions which stand not contradicted by others, and therefore may be adopted as rules. One is, that mere inadequacy of price, if the bargain is fair, is no ground of relief. Another, that if the value of the thing sold depends upon a contingency, although great advantage may be gained, yet the contract shall be sustained. Another, that old age, or infirmity alone, without practice upon it, shall not avoid a contract. But in all cases, misrepresentation of facts essential to the fair understanding of the bargain, or concealment of such facts, being within the knowledge of the party who seeks to enforce it, and in some cases, (those of trust and confidence,) *an innocent withholding of information*, that is, where the party himself is not aware of the importance of it, will be ground of relief ; in the two former cases, in a court of law, as well as in equity,—in the latter, generally, in equity only ; these courts erecting a higher standard of morality in contracts, and having the surer means of enforcing the observance of it, particularly that inquisitorial power which applies itself directly to the conscience of the party ; though even this latter doctrine is adopted at law, in the case of insurance.

"It may be taken as the result of all the cases, that any material *representation*, or actual *concealment of facts* which are essential to understanding of the subject of the contract, its value, and the bearing of the offered consideration made by a trustee to the *cestui trust*, or by an agent to his principal, is a fraud which will vitiate the gain; and that trustees, and those who are affected with that charge in a court of equity, or who stand in a confidential relation toward property and the owner, are still further obliged in their bargains relative to the trust fund, not only not to misrepresent, and not to conceal, also to disclose every thing known to them, which, in the mind of a prudent man, would be likely to affect the bargain. And if this is not the case, although there may be no design to cheat, it is a constructive fraud. Perhaps the whole doctrine is summed up in this brief sentence, taken from a case in 1 Sch. & Lefr. 209—concealment of a material fact, by the person whose duty it is to disclose it, is sufficient to set aside a contract.

"If a trustee, or an agent undertakes to purchase of the owner an estate or stock, or debts, with the condition of which he may be well acquainted and of which the owner is entirely, or partially ignorant, there is no bargain unless a sufficient disclosure should be made to enable the owner to judge of the adequacy of the offer made. And if there is any thing misrepresented or concealed, or withheld without a design to conceal, the bargain is void. But suppose, [as in the case under adjudication,] the subject-matter of the bargain to be of a complicated nature, such as an account running through many years and many volumes of books, and relating to various actions which may in a measure have gone out of memory; in such a case all which fairness requires would seem to be, to give information to lead the party into an inquiry, a willingness to answer to all questions put, and a surrender of all the materials of knowledge by the purchaser to the seller. The exhibit of a balance considerably larger than the value offered for it, is of itself one pretty strong ground for inquiry, and an examination of contingencies which may affect the bargain, and if the books and memoranda containing the elements from which the balance is computed can be offered for scrutiny, there seems to be no ground to impute to the party entering into the contract the full means of knowledge were committed to him by the other party, and does not choose, or neglect himself of them, it is his own fault if the bargain turns out unequal. He may have too much confidence in the party with whom he bargains. He may think it necessary to go into a particular examination; but if the confidence is not well placed, the bargain will not be affected." *1 Brooks*, 9 Pick. 212, 231, et seq.

Upon the same principle, an agent discovering a defect in the title of his principal, who has the equitable title cannot avail himself of the legal title to procure a grant to himself of the legal estate, and thus defeat the principal's equitable right. *Ringo*, one of the appellants in the case, was an agent who had been employed to perfect the title to a tract of land in Kentucky for his principal, in the course of his agency became acquainted with its defect, and having concealed this from his principal, obtained

title for the same land to himself. An application was made to the legislature of Kentucky, by the holders of the imperfect title, to supply its defects; which was done by a law specially enacted for that purpose. Of this proceeding Ringo was informed; and when it was stated to him, that his conduct to the injury of his principal, might be attended with unpleasant consequences to himself, he declared in writing, under his hand, in the presence of two witnesses, that he disavowed an intention to interfere with the title of his principal, and assigned to him the title which he had acquired, that the same might be carried into grant. Ringo, notwithstanding, took out a patent for the same land in his own name. On a bill filed by the claimants of the equitable title, the Circuit Court of the United States decreed, *inter alia*, a conveyance by Ringo to them, of the lands in question, which decree was, as to this particular, affirmed. *Wayne, J.* in delivering the opinion of the Supreme Court upon the appeal, says: "But how forcibly does the equity of the complainants prevail over any claim of Ringo, when the latter is viewed as their agent at the time he made his entry and surveys upon the land, which he had undertaken to assist in dividing between them. It is said, that an unregistered survey can give to them no equitable right in the land; and that Ringo being only an agent for the special purpose of dividing the land, he could rightfully enter and survey it for himself, when he ascertained the defect in the title of the complainants. The proposition of a want of equitable right in the complainants is true as against the state: for the time within which the survey should have been returned and registered before a grant could issue, had expired; and the land had fallen into the general mass of ungranted land liable to entry, survey and grant upon treasury land office warrants. But the mistake in the argument is, in applying the rights of the state in the land, to a right in Ringo, obtained when he was admitting to the complainants his agency for them; and making acknowledgments of their title to others, to enable him more successfully to secure by his artifices a title in the land to himself. The equity of the complainants, therefore, over any right of Ringo, does not arise from the former having had, at this time, any legal title to the land, but from Ringo's having practised an artifice upon the complainants, whilst he was their agent, to prevent them from curing the defect in their title, that he might deprive them of property which at the same time he acknowledged to be theirs. He was guilty of deceitful practices and artful devices, contrary to the plain rules of common honesty and fair dealing between men; and could not acquire a title to the land, valid against the equity which he had acknowledged to be in the complainants. It is unnecessary to pursue this point further. The decree of the court directing Ringo to convey must be affirmed; and the proposition laid down by this court is, that if an agent discovers a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; and if he does, that he will be held as a trustee holding for his principal." *Ringo v. Binns*, 10 Peters, 269-280. The doctrine is carried out by Lord Plunket in a case arising between client and counsel, in which the latter was not permitted to avail himself of knowledge acquired, during the connection,

for his private advantage. The facts of the case are so numerous and minute as to preclude an abridgment of them within any reasonable compass. The marginal synopsis, with some slight variation is deemed sufficient. Carter, a barrister, who had filled the situation of confidential and advisory counsel to Sir William Palmer for several years, and had thereby acquired intimate knowledge of his estates and liabilities; was held to be incapable even after the relationship had ceased for some time, of purchasing or standing securities affecting his client's estates, especially as the validity of those very securities had been impeached, and such impeachment was known to Carter, he having been frequently consulted by Palmer in reference to a compromise respecting those same securities with the then holders of them. Though much of the lord chancellor's argument turns upon the peculiar relation between client and counsel, yet it may well be applied to other fiduciary relations. He says: "It is in the power of the court to put an end to the continuance of the fiduciary character, but not to vest himself of the duty which had attached on him, not to betray the confidence which had been reposed in him, not either to communicate to a third person the knowledge of the facts which in that character have been acquired by him, or to use it on his own behalf to the prejudice of the person who had so confided in him. This rests upon clear principles of public convenience and of moral duty, as well as on positive authority. There would otherwise be an end to that unreserved intercourse between client and the person to whom he entrusts the defence either of his property, or of his life or character, which is so essential to the safe administration of justice. If the counsel could not enable a third person to work prejudice to his former client, by communicating to him the facts which he had confidentially learned, neither can he make such use of them for himself. If Carter had said to A. B. deal with M. for this security; I have learned, as counsel for Palmer, all the facts which might endanger your claim, and have learned also all the facts which would disable Palmer from successfully contesting it, I will communicate all of them to you, and make the best use of them you can, to get a cheap bargain from the one and to enforce it against the other; it would have been a gross violation of duty, and a court of equity would have restrained him from committing it. His lordship's concluding observations are more particularly interesting to the legal profession. "It is, he says, painful to be obliged to examine with strictness a transaction in which the feelings of a gentleman of a liberal profession are so deeply involved; his counsel have complained of the expressions applied to his conduct by the counsel of Sir William Palmer though I have endeavored to avoid the adoption of any terms which might appear to carry with them harshness, I am bound to say, that the conduct of Sir William Palmer do not appear to have gone beyond the line of duty, in the language they made use of in characterizing this transaction a transaction which I feel I could not sanction without injury to the character of the profession to which we belong; compromising the administration of justice, and endangering the rights of those, who are under necessity of seeking legal advice and protection." *Carter v. Palmer*

purchaser.(l) It is not alone enough that he was known to be so, according to the opinion expressed by Lord Thurlow in the following case.(m) The *defen- [*35]

Dru. & Walsh, 722, 743, 749. The general rule was applied by Leach, V. C. to a purchase by one partner from another. A partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration: the agreement was set aside. *Maddeford v. Austwick*, 1 Sim. 89.¶

(l) *Coles v. Trecothick*, 9 Ves. 234; *Morse v. Royal*, 12 Ves. 355.

(m) *Crowe v. Ballard*, 3 Bro. C. C. 119.

This rule is the same, and founded upon similar principles, as that which holds in the case of trustees. Indeed, every agent for sale, if confidentially entrusted beyond the mere performance of the service, is in the nature of a trustee. It may be proper, therefore, to refer to the leading cases upon this head relative to trustees. ¶ The doctrine on this subject is, that whatever acts are done by trustees in regard to the trust property, shall be deemed to be done for the benefit of the *cestui que trusts*, and not for the benefit of the trustee. 2 Story's Eq. Jurisp. § 1211. This doctrine was examined with his usual learning and accuteness by Kent, Ch. in the case of *Davoue v. Fanning*, 2 Johns. Ch. Rep. 252; a decision which in the state of New York, has been deemed a *leading case*, (by Walworth, Circuit Judge, acting as V. Ch. in *Hawley v. Cramer*, 4 Cowen, 734; and again when chancellor, in *Case v. Abeel*, 1 Paige, 397; by Sandford, Ch. in *Rogers v. Rogers*, Hopk. 524; McCoun, V. Ch. in *Woodruff v. Cook*, 2 Edw. Ch. Rep. 264, and by Woodworth, J. in *Gallatian v. Cunningham*, 8 Cowen, 373.) The case was presented in a very simple form; merely upon bill and answer.

The plaintiff was an infant daughter of Frederick Davoue, deceased, who, by his last will bequeathed to her and her sister Anne, (one of the defendants and the wife of the defendant Fanning,) 5000 dollars each "to be paid out of the bulk of the property," when they should become of age or marry. The testator directed, that so much of his real estate, as should be necessary to furnish the sums he had therein before bequeathed to his children, should be sold at public auction, when his children should attain to full age, &c., and the remainder of his real estate to be leased or rented by his executors. The bill charged, that the defendant Fanning, who was the sole acting executor, pretending that the personal estate was insufficient to pay the debts and legacies, sold a lot of ground in New York, though he had no authority by the will to do so, and that he caused the same to be purchased by Hedden, another defendant, for himself, (Fanning) or in trust for Ann, Fanning's wife. The answer stated, that there was not property enough to pay the debts and legacies, and that Fanning was the sole acting

dant, who was employed to sell a reversionary legacy, pu

executor of the testator, and that he caused the lot to be sold at auction, as, alleged, he had authority to do, under the will. That to secure to the defendant Ann, her legacy for her and her children independent of Fanning's husband, she and he requested Hedden to attend the sale at auction, and purchase the lot for her, if it should be sold for less than 4000 dollars : that Hedden attended the sale and bought the lot for 3800 dollars, for the use of Ann ; and the answer denied that Fanning had any other or further concern in the purchase, which the defendants insisted was correct and proper and in no way injurious to the plaintiff ; that Fanning, as sole acting executor, executed a deed for the lot to Hedden, in trust for the sole and separate use of the defendant Ann, and to be at her own disposal, and that he received no money or other consideration, but only as executor credited 3800 dollars on account of the legacy due to his wife.

The chancellor after disposing of a point irrelevant to the present transaction proceeds : " The next principle and point in the case is, whether the plaintiff is not entitled to set the sale aside, because the executor, by a previous arrangement, suffered the property to be purchased in for his wife, and executed a deed in pursuance of the sale in trust for her.

" It is contended on the part of the defendants, that this sale is not subject to objection, inasmuch as it was at public auction, and *bona fide*, and at a fair price, and the purchase was not made for the benefit of the executor himself, but for the benefit of his wife, who was one of the *cestui que trust* having an interest in the land. But I am of opinion that these circumstances do not vary the application of the general rule.

" The executor, in selling a part of the estate to raise a particular legacy, was acting as a trustee for all those who were interested in the estate under the will, and not exclusively for the benefit of his wife, whose particular legacy he was raising. The plaintiff, and all the other children had an equal interest with the defendant's wife, that the property should be sold to the best advantage, because the greater the price, the greater would be the dividend of the residuary estate. They were all equally *cestui que trust* of the executor, for he was charged with the duty of applying the proceeds of the estate to their use, and of eventually selling the whole estate for distribution among them. If, in selling a part of the estate, in the meantime, for a legacy to his wife, he could become the purchaser on account, or constitute an agent for that purpose, the temptation to abuse trust would be great and dangerous. Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the particular legacy he was raising was to go to his wife, it was no reason why he should be permitted to buy in for her the *estate itself*, when the plaintiff and the other children had also legacies to be raised out of the estate, and were equally entitled to their share of what should be remaining. His interest here interfered with his duty. *Emptor emit quam minimo potest ; venditor vendit*

chased it for himself in another *name, and after- [*36]

maximo potest. Indeed, the very fact that the executor was, in that instance, exercising the general powers of his trust for the benefit of his wife, was peculiarly calculated to touch and awaken the suggestions of self-interest. The case therefore falls clearly within the spirit of the principle, that if a trustee acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here of course, and set aside that purchase, and have the property re-exposed to sale.

“ I consider this to be a sound and settled doctrine of the court. But as the point is extremely important, and has been long and greatly agitated, it will be safe, and certainly more satisfactory to the parties, that I should not only lay down the rule, but look into the authorities on which it is supported.”

The chancellor proceeds with an elaborate examination of those authorities ; but it would be an *abuse* for the editor either to insert the chancellor's language in full, or to attempt an abridgment. The commencement of the chancellor's masterly analysis may, however, be copied in this place, without the objection of being irrelevant to the main subject, and other parts of his opinion will be found below, or in different connections. “ The earliest case,” he says, “ I have met with, containing any full recognition of the principle that a trustee cannot act for his own benefit on a subject connected with the trust is that of *Holt v. Holt*, in the 22 Car. II. (1 Ch. Cas. 190,) where it was held by the Lord Keeper Bridgman, assisted by the judges, that if an executor in trust renewed a lease, it should be for the benefit of the *cestui que trust*. The next case that occurs was that of *Keech v. Sandford*, before Lord Chancellor King, in 1726, (3 Eq. Cas. Abr. 741.) A lease of the profits of a market was devised to a trustee, in trust for an infant ; before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, because he could not distrain but must rest singly on covenant, which the infant could not make. The trustee then took a lease to himself, and the chancellor decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from the covenants in the lease, and the trustee account for the profits since the renewal. He said he must consider it a trust for the infant, ‘ for if the trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que trust* ; and though it might seem hard that the trustee was the only person of all mankind who might not have the lease yet it was very proper the rule should be strictly pursued, and not in the least relaxed, for it was very obvious what would be the consequence of letting the trustees have the lease on refusal to *cestui que trusts*.’ If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness and good sense. This doctrine has never been ques-

wards sold it again to the legatee, the original seller, b

tioned." The decree directed that the sale to the defendant Hedden, trust for the wife of the defendant Fanning, be set aside and vacated upon the following conditions; viz. that the said lot be re-exposed to sale, at public auction by the defendant Fanning, with the concurrence and agency of one of the masters of this court, on giving certain notice. That the said lot be put up at the sum of 9600 dollars, being the amount of the former sale, together with the principal and interest of the mortgage since charged thereon, and of the debts incurred for substantial improvements, and if the said lot with the improvements, thereon, shall not sell for more than the said sum of 9600 dollars, the sale heretofore made, shall, in all respects stand confirmed; but if the said lot shall sell beyond that sum, then the former sale shall be held to be vacated, and the defendant Fanning, as acting executor aforesaid, together with the said master, shall execute a deed in fee to the purchaser on receiving the consideration money, which money shall be received by the said master, and forthwith thereafter brought to court, &c., with the usual reservations. See further *Holdridge v. Gilpie*, 2 Johns. Ch. Rep. 30; *Slee v. Manhattan Co.* 1 Paige, 80; *Van Epps v. Van Epps*, 9 Paige, 238.||

It seems at one period to have been held, that, in order to invalidate a purchase by a trustee, there should be evidence that some advantage had been made by the trustee. *Whichcote v. Lawrence*, 3 Ves. Jun. 740 Lord Roslyn. || This case is reviewed and criticised by Kent Ch. in his judgment in *Davoue v. Fanning*, *ubi supra*. His words are, "In *Whichcote v. Lawrence*, Lord Roslyn seems to have spoken with a careless and latitude of expression which has given occasion to much criticism in subsequent cases. An estate was conveyed to trustees, to sell for the benefit of creditors; the estate was put up at auction, and the defendant (one of the trustees) purchased two lots, for which he received deeds from the other trustees, and he afterwards resold his lots at a profit. The bill was brought by three only of the numerous creditors, praying that the trustee might be compelled to account for the profit he had so made, and it was so decreed with costs. It is to be observed, that relief was here granted to a minority of the creditors, and it is not the decree, but the observations of the chancellor, that are deemed inaccurate. He said the trustee had here made a profit, and he did not recollect a case, in which the mere abstract rule came distinctly in question, but he tried, abstracted from the consideration of advantage made by the trustee. That the proposition was not true, that where the trustee was the purchaser, the sale was, *ipso jure*, null. That the real sense of the proposition was, that the trustee to sell should not gain any advantage by being himself the person to buy, that he is not to be permitted to gain by the execution of the trust; that unless advantage be made, the sale will never be questioned, and that it was not true as a naked proposition, that a trustee cannot buy of his *cestui que trust*."

whom a bond was given for the purchase money, and in-

“The objection to most of these observations is, that they do not place the question on the true principle. However innocent the purchase may be in the given case, it is *poisonous in its consequences*. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee had made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly, to show it. There may be fraud, as Lord Hardwicke [in *Whelpdale v. Cockson*, 1 Ves. 9; S. C. 5 Ves. 682,] observed, and the party not able to prove it. It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil. It is one which appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established.”

At another || period,|| the rule is said to be, that any trustee purchasing the trust property, is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* choose to say he is not satisfied with it. *Campbell v. Walker*, 5 Ves. Jun. 680, per Lord Alvanley, Master of the Rolls. || This case also, Mr. Chancellor Kent subjects to his keen criticism; examining *Campbell v. Walker*, he says:—“That was a devise of real estate to trustees to sell; they sold at auction, and bought in a part for themselves, at a fair price. There was no proof that the purchase was at an undervalue, or that the sale was not *bona fide* and regular. The bill was in behalf of residuary legatees, then infants, to have the sale set aside, and the lands resold. It was accordingly so decreed; and the Master of the Rolls said, that the rule did go to the extent, that the *cestui que trust* had a right to set aside the purchase, and have the estate resold, if he chose to say, in any reasonable time, that he was not satisfied with it. The trustee purchases subject to that equity. He buys with that clog. The only way for a trustee to purchase safely, if he is willing to give as much as any one else, is by filing a bill, and saying, so much is bid, and I will bid more, and the court will then examine into the case, and judge whether it be advisable to let the trustee bid. In that way the court will divest him of his character of trustee and prevent all the consequences of his acting both for himself and for the *cestui que trust*. In no other way, as he observed, could the trustee become the purchaser, without being liable to be called upon to give up his purchase. It is impossible to know whether any advantage has been gained by the purchase, or whether the trustee did all he ought to have done. In that very case he still retained the land, the defendants were still trustees, and if the plaintiffs elected to have the premises resold, they must be resold.

“When this cause was afterwards brought before Lord Eldon, [13 Ves. 600,] on the master’s report of the sale, the infants recovered their costs;

terest paid thereon for some years. On a bill filed to ha

and he observed, that a trustee for sale could not contract with the *ce que trust*, until he had distinctly and honestly removed himself from relation of trustee, which could not have been done in that case, as the *tui que trusts* were infants. He said, that a sale by auction made solid difference, as the auctioneer was an agent employed by the vend

“ It appears to me, that the observations of Lord Alvanley, in the a case, illustrate the true rule and the reason of it, in a forcible and pe cious manner; yet it would seem that he acted in direct contradic his own opinion, for he first directed an inquiry by a master, whether sale would be for the benefit of the infants. This was shaking the p ple itself, there was hazard in the inquiry, and it was far from che such sales. Lord Eldon expressed his disapprobation of the inquiry : was certainly an instance of surprising inconsistency between the re ing and the conclusion.”

The following case deserves particular attention as an instance of flexibility with which courts of equity, now, after some previous vacill are disposed to apply the general rule in its fullest and most rigid e The judgment of Lord Langdale, M. R., furnishes sufficient of the fa the present purpose. “ It appears that, in 1809, it was thought de to build a new rectory house at Woolwich, and for that purpose it w posed to sell the old house and part of the glebe lands, to obtain a p granting leases on fines, and to employ the amount thereby raised in ing a new house. To effect this purpose an act of parliament was o in 1809, authorizing certain things to be done, with the consent bishop of the diocese.

“ The moneys raised under this act being found insufficient for t pose, a second act was obtained in 1812, whereby authority was raise a further sum of £2000, by granting annuities on one or mor lives. In this act of parliament again, several things were requi done with the consent of the bishop, who, being the patron of the was a most important party to any proceedings affecting the livin several offices which seem to have been imposed upon him by the parliament, as far as they relate to the present question, were th being highly necessary and important that a house should be erec able to the rectory or to the value of the rectory, the plan of the h to be approved of by him: in the next place the borrowing of r the sale of annuities was also to be assented to by him: the m raised was to be placed in the hands of trustees appointed by the prior to their discharge there was to be a declaration of the bishop house had been finished and completed to his satisfaction. The were to be rendered by the trustees, and to be approved of by t and moreover any surplus raised by these means was to be ap the approbation of the bishop, in planting and for other purpo permanent improvement of the rectory. In all these several]

the bond delivered up on payment of the sum really ad-

therefore, it is perfectly manifest that the bishop had a very important duty to perform. He was intrusted not only with the protection of the interest of the see in regard to its patronage, but also with the protection of the rectory and the interest of all future rectors. The annuity was to be granted by the then rector ; but as the produce was to be applied for purposes which would be useful to all succeeding rectors, a duty was imposed on the bishop, to see that the rector for the time being did not abuse the power which was thus vested in him.

“ In December 1812, the rector proposed to raise £2000, by the grant of an annuity of £180, for two lives. This proposal was communicated to the bishop, who conceiving, as I think most properly, that it was his duty not to give a blind consent, but to exercise his judgment having regard to those interests which he was bound to protect, observed, that he thought 9 per cent was too high a rate, and in consequence of his interference the negotiation then pending was broken off.—It is to be inferred from the correspondence, that the bishop thought he could probably be able to find some person who would require a less price, and I cannot help thinking that the necessary inference to be deduced from his own letter is this ;—that by his own proper inquiries, and acting in a manner in the highest degree meritorious for the benefit of the rectory, he had found a person who was willing to advance the £2000, for a less annuity than that which had been previously proposed by Mr. F. the rector, under the advice of Mr. H. the surveyor. I cannot imagine that the bishop, either at this time or ever throughout this transaction, had the least sinister object in view ; so far from it, I believe he was then acting with a desire to promote the interest of the rectory, and if he had never interfered further, the transaction would no doubt have stood entirely clear ; instead of any contrivance or fraud, or any thing of that sort on his part, I think we have indications of his being actuated by a very contrary spirit. Finding that Mr. B. to whom he referred, did not think fit to advance the £2000, at a less rate than 8½ per cent, the bishop unfortunately imagined it would not be a bad thing for him to obtain the annuity at that price. But even then, so far from being actuated by any sordid or fraudulent motive, he openly and fairly states in his letter, that he had come to the determination of taking it at that rate himself, *provided that in the meantime the agent had not been able to procure the £2000 at a lower rate.*—The bishop seems to have been perfectly aware that there was a difficulty in the transaction ;—he was conscious, that being ‘ a party to the deed ’ in another character there existed a difficulty in making himself the grantee of the annuity, and he therefore proposed to have a trustee appointed. Mr. V. was ultimately fixed upon for that purpose, and the transaction was then completed. Thus the bishop, in whom all these powers were vested, in whom this trust was reposed by the act of

vanced, the whole transaction was deemed fraudulent, a

parliament, made himself in the course of the transaction, an interested party.

“ Now I apprehend that the question here, is not whether there was fraud or no fraud, nor whether there was a contrivance to get an undue advantage or not ; but the question is, whether this court will permit a person standing in the fiduciary and confidential situation in which the bishop was, to make himself an interested party in the very transaction which he was bound as trustee most vigilantly to superintend. What Lord Eldon said on this subject is calculated to make an impression on every mind. He says, (speaking quite generally of trustees and persons in fiduciary situations,) ‘ if a trustee can buy in an honest case, he may in a case which has that appearance, but which, from the infirmity of human testimony, may be grossly otherwise.’ The impossibility of detecting the conduct of trustees placed in such situations, is the reason which imposes upon the court a necessity, which I believe has always been acted on, of saying that transactions shall not stand at all. You have not the means of finding out all the modes in which advantage can be taken ; and, therefore, it is necessary, and the interests of society require, that you should forbid such transactions altogether. It appears to me the bishop was making what he thought a proper and an advantageous arrangement for himself ; but he had the slightest idea of defrauding the rectory. The simple question, however, which we are brought in this case is, whether such a transaction as this can, consistently with the rules of law, be allowed to stand ; I am of opinion it cannot, because it is a clear violation of those rules which have been established for the defence of those whose interests and property have been committed to the protection of persons placed in a fiduciary situation. On that ground alone I think this case is to be determined.” *Greenlaw v. Beav.* 49. This decision was affirmed by the Lord Chancellor. ||

It seems at present to be understood, that a trustee for sale may become a purchaser in this sense, viz. he may contract with his *cestui que trust* with reference to the contract of purchase, they shall no longer be in the relative situation of trustee and *cestui que trust*, and the trustee, through the medium of that sort of bargain, evidently, distinctly and honestly proved that he had removed himself from the character of trustee, his purchase may stand (per Lord Eldon, *Campbell v. Walker*, 13 Ves. 701) ; but that, unless the connection appear to be thus satisfactorily solved, (which will be watched with great jealousy,) it is in the hands of the *cestui que trust* whether he will take back the property, though the trustee have reaped no advantage. *Ex parte Lacey*, 6 Ves. Jun. 401. *Ex parte James*, 8 Ves. Jun. 348. || So, Kent, Ch. in *Davoue v. F. Johns*. Ch. Rep. 258, says, “ all [the later decisions] allow a trustee to purchase from the *cestui que trust*, under very special and guarded circumstances, amounting to a fair and distinct dissolution of the trust connection between them, at the time of the purchase.” And see *Green v.*

the execution of the bond, and payment of interest, no confirmation. The Lord Chancellor remarking the fact, that

Johns. Ch. Rep. 39. ¶ For instance where purchases by, or conveyances to, persons standing in the relation of trustees, have been set aside, the reader is referred to the following cases in addition to those already cited. *Randall v. Errington*, 10 Ves. 423; *Att. Gen. v. Lord Dudley*, Cooper, 146; *Downes v. Grazebrook*, 3 Mer. 200; *Watson v. Toone*, 6 Mad. 153; *Cook v. Collingridge*, 1 Jac. 607; *Watt v. Grove*, 2 Sch. & Lef. 492; *Mulvany v. Dillon*, 1 Ball & B. 418; *Dunbar v. Treddenick*, 2 Ball & B. 304; ¶ *Van Horne v. Fonda*, 5 Johns. Ch. Rep. 388; *Case v. Abeel*, 1 Paige, 393; *Wedderburn v. Wedderburn*, 2 Keen, 722; S. C. 4 Myl. & Cr. 41; *Everston v. Tappen*, 5 Johns. Ch. Rep. 514; *Ex parte Alexander*, 1 Deacon, 273. ¶ Sometimes the lapse of time has disinclined the court to interfere. *Gregory v. Gregory*, Cooper, 201, affirmed 1 Jac. 631; *Whetton v. Toone*, 5 Mad. 54; *Chalmer v. Bradley*, 1 Jac. & W. 59. ¶ The application to set aside the sale must be made within a reasonable time; but what is a reasonable time cannot well be defined, so as to establish any general rule; and must in a great measure depend upon the exercise of the sound discretion of the court, under all the circumstances of each particular case. *Hawley v. Cramer*, 4 Cowen, 718; *Philips v. Belden*, 2 Edw. Ch. Rep. 1, 27; *Fish v. Miller*, 1 Hoff. Ch. Rep. 287; *Torrey v. The Bank of Orleans*, 9 Paige, 664. ¶

This rule applies, with particular strictness, to assignees and solicitors, under commissions of bankruptcy, buying any part of the bankrupt's estate. *Ex parte Lacey*, 6 Ves. 625. ¶ This case shows that the consent of a majority of the *cestui que trusts*, is not sufficient to ratify a purchase by the trustee. ¶ *Ex parte James*, 8 Ves. 337. ¶ See further, *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Harris*, 1 Buck, 17; *Ex parte Spong*, 1 Rose, 133; *Ex parte Bage*, 4 Mad. 459; *Ex parte Hodgson*, 1 G. & J. 12; ¶ *Gallatien v. Cunningham*, 8 Cowen, 362; *Carter v. Palmer*, 1 Dru. & Walsh, 744. ¶

Under what circumstances assignees may, ¶ on application to the court, ¶ be permitted to bid, see *Anon.* 2 Russ. 350; *Ex parte Moreland*, 1 M. & M. 76. ¶ On general principle, a party to a suit in equity is not precluded from becoming a bidder for the property decreed to be sold, though by the rules of the English Court of Chancery, he must obtain permission for the purpose. In a case in which one co-defendant purchased in an estate without such permission, and another co-defendant moved that the estate might again be put up for sale, Shadwell, V. C. took the distinction between a party in the cause, and a party to conduct the sale. "There is," he says, "a difference between a mere party to a cause, and assignees in bankruptcy, with respect to purchases made without the permission of the court. Assignees in bankruptcy sell the bankrupt's property, because it is their duty to do so under the statutes relating to bankrupts, and without

the defendant was himself the purchaser, says, "that a is sufficient to set aside the transaction. It is impos-

the direction of the court. They are merely trustees for sale ; and therefore it is reasonable that, where they purchase the property for themselves, such orders should be made against them as were made in the cases [*Ex parte Reynolds* and *Ex parte Lacey, ubi supra.*] But, as far as experience goes, there is no instance of a similar order being made, if the purchaser was, merely, a party in the cause, and not, as such, the person to conduct the sale. Ordinarily, the plaintiff in the suit has the conduct of the sale. But, in this case, the application is made only by one and supported by another of several co-defendants in the suit. The court has made a rule that, where property is sold under a decree, no party shall bid for it without the permission of the court, all that it has to do is to see that its own rule is enforced ; but it will not enforce it against a party to a cause, in the same manner as it will against assignees in bankruptcy. The motion was refused, without costs, "as the party did wrong by bidding at the sale without having obtained the leave of the court." *Elwo v. Billing*, 10 Sim. 98.

Wilson v. Greenwood, cited in a note, *ibid.* p. 101, was as follows : filed by assignees of a bankrupt partner against the solvent partner for an account and sale of the partnership effects. An order was made for the sale of the partnership effects before the master. The defendant attended the sale and bid, and was declared the highest bidder. A motion was made to set aside the sale, on the ground that the partner was not at liberty to bid. Lord Eldon refused it."

A residuary legatee, a tenant for life, or the owner of a reversionary interest, may become the purchaser of an estate sold in the master's court. "but," says Lord Eldon, "if the matter were *res integra*, I should have no great doubts whether they ought to do so." *Williams v. Attenborough*, 10 Turn & Russ. 70.

There being a question whether a mortgagee foreclosing and selling under the power usually contained in mortgages in the state of New York, without proceeding by bill in equity, could become a purchaser, the question was removed, and permission for the purpose given by statute. (1st ed. p. 541, § 7 ; which is, however, merely a re-enactment.) It is very obvious and palpable, that sheriffs, masters in chancery, and other public officers, having the conduct and management of sales, cannot become purchasers, either directly or indirectly, although there is no statutory prohibition ; and that a court of equity, according to the established and familiar doctrine, would set aside such sale. In *Lanning*, (p. 268,) Kent, Ch. says: "I may refer to the statute which prohibits a sheriff, or other officer to whom an execution is directed, from purchasing at the sale under it. This is an affirmation of the same general principle, and the other statute which allows a mortgagee selling under a power

at any rate, that the person employed to sell can be permitted to buy. Even if this were done with the know-

purchase in the land, provided the sale be, in every other respect, regular, and fair, does, by that very exception, recognize the existence of the rule in all other cases."¶

As to purchases by attorneys or solicitors from their clients, see ante, p. 11. ¶ *Wendell's Ex'rs & Heirs v. Van Rensselaer*, 1 Johns. Ch. Rep. 344 ; *Arden v. Patterson*, 5 Johns. Ch. Rep. 49, 50.¶ The distinction between attorney and trustee to sell, as to contracts with the client or *cestui que trust*, is stated to be this : that an attorney, though retaining that character, may contract, subject to the *onus* of proving that no advantage was taken of his situation. But for a trustee, it is not sufficient to show that he has not taken advantage ; the general rule being, that he must first divest himself of the character altogether. *Cane v. Lord Allen*, 2 Dow, 289.¶ In the elaborate opinion of the present Chancellor of New York, (Walworth,) then acting as Vice Chancellor, in the case of *Hawley v. Cramer*, 4 Cowen, 718, 739, he observes : " There are strong reasons, on the ground of public policy, against permitting the attorney [in a suit in which he has himself issued execution] to become the purchaser, either for himself or as an agent of another, in any case, where it can possibly interfere, in any manner with the rights or interest of his client. And, I strongly incline to the opinion, that the only safe rule is, to set aside all such purchases, as of course, on the application of the client, where the purchase has been made without his knowledge and consent, if any part of the debt remains unsatisfied. But it is not necessary that I should go that length for the decision of this case. It will be sufficient if I apply to this case, the general principles which regulate and are applicable to the dealings between attorney and client. The rule as I understand it is this : An attorney, retaining that character, may contract with his principal, when the principal is acting in his own right, and not as an agent or trustee for another ; or he may purchase at public auction, or private sale, in cases where his client is interested in the proceeds of such sale, provided the purchase is made with the knowledge and consent of his client. But in all cases where the relation of attorney and client exists, and which is in any manner referable to the subject of the purchase, whether such purchase be made by the attorney on his own account, or as the agent, or for the benefit of others, the purchaser must be subject to the *onus* of making it fully manifest that no advantage has been taken of the client."

The distinction between an attorney or solicitor, and a trustee, as to the capacity of becoming a purchaser, is ably examined and explained, in a recent case, by Wigram, V. C. He says : " It was not insisted in argument that a solicitor is under an actual incapacity to purchase from his client. There is not, in that case, the positive incapacity which exists between a trustee and his *cestui que trust* ; but the rule the court imposes

ledge of the party selling, it could not be supported. The principle must prevail, even if he had bought it fair

is,—that inasmuch as the parties stand in a relation which gives, or give, the solicitor an advantage over the client,—the *onus* lies on the licitor to prove that the transaction was fair. The rule is expressed by Lord Eldon (6 Ves. 278,) to be, that if the attorney ‘will mix with the act of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given him against a third person.’ It was argued that the rule I have referred to has no application unless the defendant was the plaintiff’s solicitor *in hac re*, and this argument is no doubt well founded. It appears to me, however, that the question whether Meyrick was the solicitor *in hac re*, is one rather of form than of substance. The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equality of footing which such parties should stand. In some cases, as between trustee and *cestui que trust*, the rule goes to the extent of creating a positive duty; the duties of the office of trustee requiring on general principle that particular case should be so guarded. The case of solicitor and client is however different. In the case of *Gibson v. Jeys*, (6 Ves. 266) there was evidence that the client was of advanced age, and of much weakness both in mind and body, that the consideration was inadequate,—and various other circumstances; Lord Eldon there shows how each of these circumstances gave rise to its appropriate duty on the part of the attorney. In other cases, where an attorney has been employed to manage an estate, he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made to his own advantage. But as the communication of such knowledge to the attorney will place the parties upon an equality,—when it is proved that such communication was made, the difficulty of supporting the transaction *quoad hoc* removed. If, on the other hand, the attorney has no communication with the estate respecting which the question arises, the duties to which any given situation of confidence might give rise, are in no course attach upon him, whatever may be the other duties which the mere office of attorney may impose. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult,—and without the evidence that no advantage was taken by the attorney of his position,—that the vendor had all the knowledge which could be given him to form a judgment, it would be impossible to support the transaction.

And it was stated, on a very recent occasion, "that the principle upon which a court of equity acts, in cases of this

other cases the relation between the parties may simply produce a degree of influence and ascendancy, placing the client in circumstances of disadvantage ; as where he is indebted to the attorney, and is unable to discharge the debt. The relative position of the parties in such a case, must at least impose upon the attorney the duty of giving the full value for the estate, and the *onus* of proving that he did so. If he proves the full value to have been given, the ground for any such unfavorable influence is removed. The cases may be traced through every possible variation until we reach the simple one where, though the relation of solicitor and client exists in one transaction, and, therefore, personal influence or ascendancy may operate in another, yet the relation not existing *in hac re*, the rule of equity to which I am now adverting may no longer apply. The nature of the proof, therefore, which the court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendancy or other advantage over his client ; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing.

"I have, therefore, to consider the position in which these parties actually stood to each other. And I certainly am not treating the case of the plaintiff too strictly when I exclude all considerations which the bill does not state as having existed ; and, according to the statements in the bill, it does not appear that the defendant had any peculiar or exclusive knowledge of these particular farms, or the value of them, or that he had undertaken any particular duties respecting them which were opposed to his becoming a purchaser. No equity appears to me to arise, except that which might arise from the mere possibility of the relation of attorney and client, giving the attorney some influence or ascendancy over the client, and the circumstance that the plaintiff was pressed by him to pay his bill of costs. On the evidence in the cause I am satisfied that the only ground upon which I can proceed, is this bare relation between the parties. Taking the obligations of the defendant to stand as high as the relative position of the parties enables me to place them,—admitting the defendant to be the attorney *in hac re*,—I cannot consider that he is bound to do more than prove that he gave the full value for the estate." The bill was dismissed so far as it sought to set aside the sale in the pleadings mentioned ; but without costs. *Edwards v. Meyrick*, 2 Hare, 60, 68, 79. And see *Wendell's Ex'rs v. Van Rensselaer*, 1 Johns. Ch. Rep. 344 ; *Hawley v. Cramer*, 4 Cowen, 742.¶

Coles v. Trecothick, 9 Ves. 234, and *Morse v. Royall*, 12 Ves. 355, explain under what circumstances the purchase of a trust property may be

kind, which has been settled in many instances, and upon the clearest grounds of equity and the general sanctity of contracts, is, that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all [*37] knowledge which he himself *possessed."⁽ⁿ⁾ However, the court, in the exercise of its discretion, may see reason to be convinced that by re-opening the sale the price would fall short of the sum given, that may afford ground for upholding the sale.^(o)

6. It has been said^(A) that the same principle operates upon agents employed to purchase.—The undertaking of an agent employed at a certain commission or salary to purchase for the use of his principal, is to buy in the

confirmed. † See also *Naylor v. Winch*, 1 S. & S. 566; *Lord S. Rhodes*, 2 S. & S. 49. ‡ The cases cited in this note abundantly confirm the rule that the circumstance of the sale having been made at public auction does not remove the incapacity of the purchaser. The Roman law prohibited a tutor from being both buyer and seller; but if he had a co-tutor with authority to sell, he might purchase provided there were no fraud. *D. de Re. Vendi.* 26, 8, 5, 2; cited 1 Liv. Ag. 426. But no such distinction exists in our law; and the assent of his co-trustees will not enable a trustee to purchase. *Hall v. Noyes*, 3 Bro. C. C. 483; *Whichcote v. Lawrence*, 3 Ves. 401. *Livermore*, (*ubi supra*,) justly observes: "There is generally great vigilance where there is a number of trustees; but it is the duty of a trustee to correct the negligence which the number of trustees may occasion." And see *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 341, 342. ||

(n) *Lowther v. Lowther*, 13 Ves. 103; † and see *Lord Hardwicke v. Vernon*, 4 Ves. 411; *Whitcombe v. Minchin*, 5 Mad. 91; *Oliver v. Dan*, 301; 8 Price, 127; *Woodhouse v. Meredith*, 1 Jac. & W. 20 & B. 319. ‡

(o) *Wren v. Kirton*, 8 Ves. 502. || "In cases of purchases by an agent or others, who are not authorized to purchase without the consent of the principal or *cestui que trust*, the rule of equity is, that if the purchaser does not divest himself of the property, it is to be put up again, at the same price as of the former bid, together with the value of beneficial and lasting improvements made thereon after the sale, and if it brings nothing more than the purchase price, he shall be holden to his purchase. But, if he has parted with the estate, he shall be compelled to account for all the profit which has been made by the re-sale." Walworth, Circuit Judge, *Hawley v. Cramer*, 4 Co. & B. 319. And see the decree in *Davoue v. Fanning*, ante, 34, n. (m.) ||

(A) || Ante, 33. ||

beneficial manner for him ; and therefore it is declared to be contrary to the duty and trust of a (p) person in that situation to be himself the seller, unless it be so understood by plain and express consent.(p) It is obvious that the character of a seller is incompatible with diligence and exertion in obtaining goods at the lowest price.(4) (B)

(p) *Massery v. Davies*, 2 Vea. Jun. 317.

(4) † Upon the same principle, an agent employed to buy, having purchased for himself, was decreed in equity to stand as trustee for his principal. *Jones v. Davids*, 4 Russ.‡ || If the case 4 Russ. 277, is the one here alluded to, it has no connection with the subject. The point, as stated by the English Editor, is, however, unquestionable. *Lees v. Nuttall*, 1 Russ. & M. 53 ; S. C. Taml. 282. *Church v. Sterling*, 16 Conn. Rep. 400.||

(B) || The doctrine on this subject is ably enforced and elucidated in two recent cases, decided by two eminent equity judges. The value and importance of the decisions will excuse the length of the extracts ; and in either case, the extracts mainly present the facts as to which the decisions apply. The first case was as follows : Peppercorne, the defendant, was largely interested in a certain company, of which he was also an active director. Having recommended the plaintiff to make investments, the plaintiff purchased through the defendant twenty-five shares in the undertaking, and which shares were transferred to the plaintiff by persons named Ewart, Cole and Manning-respectively, and from whom apparently the defendant purchased such shares for the plaintiff. It subsequently turned out, that at the times of the sales, these shares actually belonged to the defendant, and that they had shortly previous been transferred into the names of the apparent vendors, as trustees for him. There was no evidence of the prices charged being extravagant, or of any fraud having been intended. Still, in pursuance of the rigid rule of equity, the transaction was set aside. Lord Langdale, M. R. said ; “ It appears from the facts admitted, that the plaintiff and defendant in this case had been on terms of intimacy for a great length of time, and that the plaintiff had very frequently employed the defendant as his stock broker and agent. The defendant was a director and the principal manager of the Vauxhall Water Works Company. The plaintiff began to have an interest in this company about April, 1826 ; and about the same time, or in the beginning of the following month of May, the plaintiff was desirous of increasing his interest in the company. The first transaction, which is impeached, was completed through the medium of the defendant on the 8th day of May ; and it appears to me from the documents, that in that transaction, the defendant did act as the agent of the plaintiff ; that transaction, on the face of it, was a purchase by the defendant of ten shares, from a Mr. Ewart, the apparent owner, who conveyed these shares to the plaintiff at a price amounting altogether, with the stamp,

An agent, therefore, who deals as a merchant with the express consent of his principal, is accountable to his

to the sum of £931 ; and it seems, that on the 29th of April, a few days before, the defendant had, for a nominal consideration, transferred to Ewart the same number of shares ; and on the whole it appears beyond doubt, that at the time when the defendant was apparently acting as agent of the plaintiff in purchasing the shares for him from Mr. Ewart, he was, in fact, selling and causing to be transferred shares which were his own property.

“ The second transaction which is impeached took place in December, 1830 ; upon that occasion it appears to me from the documents, without going further, that the defendant was acting as the gratuitous agent of the plaintiff ; *but the acting gratuitously makes no difference in my mind to the result of this transaction.* Mr. B. Cole then transferred ten shares in this company to the plaintiff. Now, so far as the plaintiff could be concerned from this transaction, Mr. Cole appeared to transfer ten shares to him according to his nomination ; and Mr. Peppercorne appeared to be acting as the agent of the plaintiff, procuring that transfer and effecting the same ; while the fact was, that on that very day, Mr. Cole had received ten shares from a person of the name of Davies, and on the same day Mr. Davies for a nominal consideration, had received from the defendant ten shares in that company. It is further alleged by the bill that at some considerable time previous Mr. Davies had also received from the defendant other four shares for a nominal consideration ; but I do not consider that to be proved.

“ The third transaction which is impeached took place on the 1st of January, 1831. Upon that occasion, also, it appears to me, that the defendant was acting as the agent of the plaintiff. The transaction, one of the objects of it, was a purchase from, and a transfer by Mr. Manning of five shares to the plaintiff. The cost of those shares was 454*l.* 17*s.* 6*d.* ; and in this case, as in the former, it seems that the defendant had previously transferred ten shares to Mr. Manning for a nominal consideration. To the extent, therefore, of the twenty-one shares, it appears to me that the defendant was acting as the agent of the plaintiff, when, at the time he was appearing to the plaintiff to act as his agent, and to be procuring them from somebody else. The single question in this case, I apprehend, is, whether such a transaction can be supported.

“ It is said that this is every day's practice in the city. I should be very sorry to have it proved to me that such a sort of practice is usual ; for nothing can be more open to the commission of fraud than the actions of this nature. Where a man employs another as his agent, upon the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer ; and assuredly not with the view of enriching the person whose assistance is required as agent, has himself, in

for the profits made by this indirect dealing, that is, for the surplus charged by him above the prime cost of the article

transaction, an interest directly opposite to that of his principal. It frequently, I believe, happens that the same person is agent for both parties, in which case he holds an even hand, and acts, in one sense, as arbitrator between them ; [sed vide ante, 33, n. 3 ;] but if a person employed as agent on account of his skill and knowledge is to have, in the very same transaction an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature, as must inevitably lead to continued disappointment, if not to the continued practice of fraud.

“ I am of opinion that these transactions cannot be supported, not only are they in themselves so extremely likely to lead to the commission of fraud, *as to make them directly against the policy of the law* ; but in those cases which have occasionally come to the knowledge of the court, and which fortunately have not been frequent, it has invariably been found that fraud has been the result of such transactions. It is not necessary to show that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff that the transaction cannot, in the contemplation of this court, be considered valid.” *Gillett v. Peppercorne*, 3 Beav. 78.

In the second case alluded to, the defendant Heathorn was one of six directors of a joint stock company established for the building, purchasing, hiring and employing of steam vessels, and being authorized by the directors to purchase a vessel for the company, sold them the ship Nourmahal, of which he had previously become the owner, as if the purchase had been made from a stranger, and for a higher price than he had himself paid. Knight Bruce, V. C. said ; “ It appears that this vessel was bought for a sum of £1340 by Mr. Heathorn, and was transferred into his name, and he became the registered owner. It appears that subsequently a vessel of her description being required by the directors, Mr. Heathorn who had been before employed by the directors for the purpose of purchasing ships, was asked to look out for such a vessel. He reported to the directors that he had agreed to buy the ship Nourmahal for a sum of £1500. This report is adopted. A check of £400 by way of deposit is given him, contemporaneously with the report and its adoption ; and within a week, or less than a week afterwards, the remaining £1100 of the £1500 is paid ; another singular circumstance of the case being, that notoriously, in the city of London, before this day, this vessel had been publicly advertised, in the usual place for such advertisements, as the vessel of Mr. Heathorn himself. This fact also appears, that, as on a purchase for the sum of £1500 from a stranger, (at least I must suppose so,) Mr. Heathorn is actually paid £15,

[*38] supplied, *though not more than the principal must have paid to any other merchant. This principle is particularly recognized by Lord Thurlow upon occasion of a bill filed by the East India Company against one of their servants for an account of profits made by supplying the Company with silks under a collusive contract with the board of trade. "If, being a factor, he buy up goods which he ought to furnish as factor, and instead of charging storage duty, or accepting a stipulated salary, he take profits, and deal with his constituent as a merchant, this is a fraud for which an account is due."*(q)* And in a subsequent case, an agent employed to furnish timber for a millery, at a certain stipulated salary, was decreed to account for profits made by selling his own timber to his principal under the name of another person with whom he had clandestinely engaged in a partnership.*(r)* And not only the agent himself who betrays his trust, but the merchant, knowing the agent to be guilty of a breach of duty, entering into the transaction with him,*(s)* or by collusion obtaining a price he ought not to have had, is liable to account in equity, as for a fraud.*(t)*

as a commission of £1 per cent on the £1500; he is also allowed 1 guineas earnest, which according to the usual course of trade, is paid to a broker on such occasions; and what perhaps is still more extraordinary is that he is allowed the costs of the bill of sale; the only bill of sale which took place being the bill of sale from the former owner, which was in his property in himself previously to the proposal to him that he should purchase the vessel of this description.—Under these circumstances is it possible to suppose whatever may have been the secret intentions of Mr. Heathorn when he bought this vessel—is it possible for a judge in a court of law to hear him say that he bought it otherwise than as agent? I find it impossible to do so; his own mode of proceeding has, in my opinion, indisputably and inextricably fixed him with the character of agent from the beginning of that transaction. The declaration therefore must be that the defendant Heathorn ought to be considered as having purchased the ship for £1340 as the agent and on the behalf of the directors."

v. Heathorn, 1 Yo. & Coll. C. C. 346.]]

(q) *East India Co. v. Henchman*, 1 Ves. Jun. 289.

(r) *Massey v. Davies*, 2 Ves. Jun. 317.

(s) *Ib.*

(t) *East India Co. v. Henchman*, 1 Ves. Jun. 289.]] Upon

7. It is of consequence to an agent, in consulting his own indemnity, to apprise his principal, with convenient

principle an agent employed to purchase or compound debts due by his principal, cannot purchase a debt on his own account. Lord Cottenham says: "why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain, and if he is employed for that purpose, and is enabled to procure a settlement of the debt for any thing less than the whole amount, it would be a violation of his duty to his employer, or, at least, would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle." *Reed v. Norris*, 2 Myl. & Cr. 374. So, where Reed the plaintiff who had failed in business, employed Warner one of the defendants to compromise with his creditors, and authorized him to offer fifty cents on the dollar upon such compromise, and Warner while acting as such agent, purchased three of Reed's notes at that rate, which *after they became due* he sold to a *bona fide* purchaser, for their nominal value; it was held that the latter could recover against Reed no more than fifty per cent. *Reed v. Warner*, 5 Paige, 650. There may be something peculiar as to the direction of the chancellor in regard to the costs in this case, but there can be no doubt that Warner was chargeable with the costs, and that he was properly a party to the suit, if made so for no other purpose than to charge him with costs. Although this may be considered as merely a matter of chancery practice, yet it may not be useless to remind the reader that the author of a fraud may be brought into a court of equity merely for the purpose of relieving from expense those whom his misconduct has compelled to the necessity of litigation. *Graham v. Coape*, 3 Myl. & Cr. 643. *Beadles v. Bunk*, 10 Sim. 332, 338.—So, an executor, administrator, assignee of bankrupt, or other trustee, purchasing a debt due from the estate which he represents, or an incumbrance upon it, can only charge the estate with the actual expenditure. *Green v. Winter*, 1 Johns. Ch. Rep. 27, 36; *Hawley v. Mancius*, 7 Johns. Ch. Rep. 188; *Quackenbush v. Leonard*, 9 Paige, 334; 1 Liv. Pr. & Ag. 425. A mortgagee in possession of a leasehold estate, obtaining a renewal of the expired lease, holds it only as a trustee for the mortgagor. By the same rule, a mortgagee buying in prior incumbrances can only claim the amount he paid. *Dale v. McEvers*, 2 Cowen, 118; *Holridge v. Gillespie*, 2 Johns. Ch. Rep. 30; *Slee v. The President &c. of the Manhattan Co.* 1 Paige, 80; *Cameron v. Irwin*, 5 Hill, 272; 2 Story's Eq. Juris. § 1016; *Gordon v. Lewis*, 2 Sumn. 155; *Van Buren v. Olmstead*, 5 Paige, 9. So, an heir at law buying in incumbrances, purchases them for the benefit of the estate. Lord Lyndhurst, *Lancaster v. Evers*, 1 Phillips, 354. And the rule extends to a surety compounding his principal's debt; the surety can only recover what he has paid. *Reed v. Norris*, 2 Myl. & Cr. 361; see 1 Story's Eq. § 316.¶

[*39] expedition,(A) of all material acts *done or concluded by him. It must, in general, be a question to be decided according to the particular circumstances of each case, whether the culpable delay of the agent in this respect, have occasioned an injury to the principal; but, in general, it is incumbent upon him to give the earliest notice of such things as may make it necessary for the principal to take steps for his own security.(B) Thus

(A) || *Parkhill v. Imlay*, 15 Wend. 431 ; ante 27.||

(B) || So, where an agent sells on credit to a person who becomes insolvent, and does not give notice of that fact to the owner, within a reasonable time, he is liable for all the damage the owner suffers in consequence of not receiving such notice. *Forrestier v. Bordman*, 1 Story's Rep. 387; *Harvey v. Turner*, 4 Rawle, 223; *Arrott v. Brown*, 6 Wharton's Rep. 9. So, where an agent having received money unreasonably neglects to inform his employer of it, he is liable for interest from the time when he ought to have given information.—In 1803 and 1804 Unite Dodge, a merchant in St. Domingo, endorsed and transmitted to J. & T. H. Perkins a mercantile house in Boston, consisting of James Perkins and the defendant, four bills drawn on the French government, requesting that they might be sent to France for collection. J. Perkins made an entry of the bills in his own memorandum book, and stated that the proceeds were to be remitted to London, but no entry was made in the regular account books of the house. The bills were duly sent to Hottinguer & Co., bankers in Paris, and presented for payment and protested, and Unite Dodge was put into correspondence with the bankers, and he therefore charged them in his books, and discharged J. & T. H. Perkins. In 1806 Dodge died, and in the same year, upon inquiries made by Brun, Frères of Bordeaux, with intent obviously to get the bills in their own hands, of Hottinguer & Co. the latter replied that they were accountable only to J. & T. H. Perkins, and upon notice of this interference, James Perkins in the name of the house, wrote to Hottinguer & Co., that the bills belonged to them, and had nothing to do with the concerns which might exist between Dodge and Brun, Frères. In 1815, the French government issued stock in payment of these bills and of two others belonging to J. & T. H. Perkins, and Hottinguer & Co. gave them notice, and James Perkins made an entry in his memorandum book of the amount of stock for which each bill was cashed, representing three of the four to be the property of Unite Dodge and the fourth to be the property of a house, of which James Perkins had formerly been a member. Hottinguer & Co. received and retained the dividends on the stock until 1822, when upon the death of James Perkins the defendant, as surviving partner, directed Hottinguer & Co. to dispose of the small amount in the French funds belonging

agent, to whom a bill of exchange is remitted to present for acceptance, ought to give notice by the first post of the acceptance or refusal.(u)

late house, and remit the amount with the accumulation to a banker in London : upon which Hottinguer & Co. remitted the proceeds of the six bills, and the defendant not recollecting that Dodge had any interest in them, credited his share to the account of profit and loss. The defendant drew bills upon the London banker for the amount in his hands, the rate of exchange on England being above par. In 1807, the plaintiff, Dodge's executor, proved his will in New York, and in 1827 took out letters of administration *cum testamento annexo*, [letters testamentary ?] in Massachusetts ; he, the plaintiff, having previously in the same year, 1827, satisfied the defendant that three of the bills belonged to the testator, and having demanded the proceeds of the four bills with interest. It was held that the agency of J. & T. H. Perkins ceased when the testator was put in direct communication with Hottinguer & Co. ; that it was resumed by the correspondence in 1806 ; that it was their duty, whether the agency were gratuitous, or for a commission, to have made such entries in their books as would have shown that the testator was interested ; that it was the duty of the defendant, T. H. Perkins, to have given notice, in 1822, of such interest, to some of the heirs, [the subject involved was personal property ;] they being known to him ; that having neglected so to do, he was liable for interest from that time ; and that as originally the proceeds of the bills were to be remitted to London ; he was liable to account at the rate of exchange on England at the time of the remittance. *Dodge v. Perkins*, 9 Pick. 368.

The above case affords a full illustration of the general doctrine—as to the necessity of the agent's furnishing constant information to his principal ; but the rule could not be applied to the facts of the case, without a statement of the facts ; and hence the editor has been drawn into a length of statement, which is not often justifiable.¶

(u) Beawes, 431. ¶ Where a bill or note is endorsed by the holder, and sent to an agent for collection, the latter need not give notice of dishonor to all the parties, but it is enough if he notify his principal, who may charge the prior parties by giving them notice himself ; and this, though it appear that had the notices been sent by the agent, they would have been received sooner. *The Bank of the United States v. Davies*, 2 Hill, 451 ; *Mead v. Engs*, 5 Cowen, 303.¶

SECTION 8.

The responsibility of factors, or other agents, for price of goods, &c. sold by them, or the produce of contracts made by them, does not, by the common tenor of their employment, attach till it is received; (A) unless where they have improperly sold upon credit, as has already mentioned; (B) or, secondly, where the delay in payment has been occasioned by their neglect. And in an action against an agent for the price of goods sold by Mr. J. Buller declared it as his opinion, that if an agent employed to sell receive part only of the price, the principal cannot maintain an action for it till the transaction be closed, unless it appear to be his fault that the rest of the price is not recovered. For if contrary practice were to prevail, there might be many actions brought where one cause of action only existed. (a)

‡ If the agent admit that he has received the money, by debiting himself in account with his principal, or taking credit in account with the debtor, he is then

(A) || *Lillie v. Hoyt*, 5 Hill, 395. An agent merely for the purpose of collecting money, is bound to pay it over to his principal, within a reasonable time, without any demand. Ibid. A factor who remits a bill to his principal in payment of goods sold on his account, and endorses it, does not thereby become personally responsible to his principal. He receives no consideration for guaranteeing, and does not expressly agree to do so. *Sharp v. Emmett*, 6 Wharton's (Pennsylvania) Rep. 5.

(B) || Ante, p. 26.||

(a) *Varden v. Parker*, 2 Esp. Cas. 710. Whether in that case the price had been received, or whether the whole were [what the report does not state. But the opinion of the learned judge, from the text implies, that part, but not the whole, had been received. The fact had been merely that no part had been received, that opinion would have been superfluous. ‡ Very little reliance can be placed on reports which rests on the authority of these reports. The proposition is, to say the least, questionable.‡

(c) || *Shaw v. Picton*, 4 Barn. & Cr. 715.||

precluded from saying, as against the claim of his principal, that the money has not been received.(1)‡

2. An agent acting under a *del credere* commission is answerable to his principal for the produce of sales, or other contracts, effected by him, without any regard to whether he has received it.

(1) ‡ *Andrew v. Robinson*, 3 Campb. 199. || The general principle is lucidly stated by Bayley, J. in the following terms :—" It is quite clear, that if an agent, (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not,) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake. If he cannot show that, he is not at liberty afterwards to say that the money had not been received, and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit. I think that when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again." *Shaw v. Picton*, 4 Barn. & Cr. 715 ; and see *Skyring v. Greenwood*, id. 281 ; *Doe v. Stacey*, 6 Carr. & Payne, 139. The payment of a balance of account by a factor or commission merchant to his principal, after the sales made, and for the purpose of closing the accounts between the parties is an assumption of the outstanding debts ; and consequently the principal is no longer accountable, or bound to refund advances, though the debtors finally fail to pay for goods sold on commission, the proceeds of which were looked to for reimbursement. *Oakley v. Grenshaw*, 4 Cowen, 250 ; *Consequa v. Fanning*, 3 Johns. Ch. Rep. 598. But where a factor sold goods on credit, took the note of the vendee payable to himself, and then settled with his principal, giving him his own note for the balance, made payable a few days after the note of the vendee became due, for the mutual accommodation of both principal and agent—(this is a fact fairly to be inferred from the report)—it was held that the factor did not assume the vendee's debt. *Robertson v. Livingston*, 5 Cowen, 473 ; *Gorlies v. Cumming*, 6 Cowen, 181.|| And it has been said by Lord Ellenborough in one case, that " it is not necessary to prove that the agent actually received the money, in order to entitle the principal to recover for money had and received to his use, for if, after a reasonable time has elapsed, the agent do not account to the principal, it may be presumed that he has received money for the goods." *Hunter v. Welch*, 1 Stark. N. P. C. 224. This *dictum*, however, is very questionable. The proper and only mode of proceeding seems to be, by a special action against him for not accounting.‡

[*41] *A *del credere* commission(*b*) is one under which the agent, in consideration of an additional premium, engages, to ensure to his principal not only the solvency of the debtor, but the punctual discharge of the debt:(*c*) and he is liable in the first instance, without a previous demand from the debtor.(*d*)

(*b*) 6 Bro. P. C. 287.

(*c*) Beawes, 429 ; || *Redfield v. Davis*, 6 Conn. Rep. 443 ; *Swan v. Nesmith*, 8 Pick. 224. But such commission is not demandable, when the sale, although made on credit, is nevertheless paid for, in cash, in consideration of the deduction of a certain per centage. *Kingston v. Wilson*, Wash. C. C. R. 310. The liability of a factor to his principal for the profits of sales made by him, under a *del credere* commission, is not affected by the statute of frauds, and therefore may be proved by parol evidence. *Nesmith v. Nesmith*, 7 Pick. 220 ; *Wolff v. Koppel*, 5 Hill, 458. In the last case, Cowen, J. delivering the opinion of the court, said :—" A guarantee, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guarantee in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time ; and in order to charge him, negligence must be shown. He takes an additional commission however, and adds to his obligation, that he will make no sale to persons absolutely solvent ; in legal effect, that he will be liable for the loss which his conduct will bring upon the plaintiff, without the necessity of proving negligence. The merchant holds the goods, and will deliver them to the factor, without this extraordinary stipulation, and the commission is to be paid to him for entering into it. What is this, after all, but another form of selling the goods ? Its consequences are the same as in the former instance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is contingent, arising on the event of his failing to secure it through another—some vendee, to whom the merchant is first to resort. Upon non-payment by the vendee, the debt falls absolutely on the factor."||

(*d*) *Grove v. Dubois*, 1 T. R. 112. ¶ See post, || 111, n. 3,|| where the inaccuracy of this position is pointed out. A *del credere* agent is a surety to his principal.¶ Acc. Story J. *Thompson v. Perkins*, 10 Mass. 232. Mr. Chancellor Kent considers the case of *Grove v. Dubois* as having been ruled. 3 Comm. 624, 625, n. (*f*.) But " it seems," he says, " to have been adopted and followed in *Leverick v. Meigs*," 1 Cowen, 645. There is much obscurity in the leading opinion in that case, that it is difficult to understand what meaning the learned judge who delivered it intended to convey.

As this commission makes the factor responsible, not only for the solvency of the purchaser, but for the absolute payment of the price to the seller, in the same manner as if he were himself the principal, it follows, that if he receive the price from the purchaser and remit it by bills to his principal, he is responsible for the payment of those bills, and is not discharged like a common factor, by the circumstance of the parties to the bills being in good credit at the time when he took them. M'Kenzie & Co. merchants in Scotland, sold corn for Scott, who resided in London, at three months' credit, and took the purchaser's bills at that date. But for the greater accommodation of Scott, they procured for those bills others drawn by a house in Edinburgh, upon a house in London, both in good credit at the time, at seventy-five days, payable to their own order, which they remitted to Scott endorsed, who got them accepted, credited M'Kenzie & Co. *with [*42] the amount, settled accounts with them, and paid them a balance for an accidental over-payment. M'Kenzie & Co. in calculating the amount of the bills, had charged $2\frac{1}{2}$ per cent. for common commission, besides $1\frac{1}{2}$ per cent. for a *del credere* engagement. Upon the failure of the drawers and acceptors of the bills, M'Kenzie & Co. insisted that they were not liable to Scott, contending that their engagement only extended to the solvency of the purchaser, and the due payment by him; that the remittance was a new transaction, and that to make them liable at all events for the goodness of the bills remitted, required a distinct commission upon the remittance; and that the first commission being at an end by the payment of the purchaser in good bills, they were, as to the remittance in the condition of common factors, and consequently discharged

convey : perhaps he did not clearly understand it himself. The point, however, necessary for the decision of the case, may be safely admitted, viz. that an agent required to remit the proceeds of sales to his principal, by bills, must exercise due diligence in ascertaining the credit of the drawer of such bills.||

by having proceeded in the usual course of trade, and
mitted by bills which were in unquestionable credit
the time. But the Court of Session in Scotland, and
terwards the House of Lords, decreed, that they were
able: considering, as it seems, that nothing short of
same payment which would discharge the purchaser, is
ficient to absolve a factor under a *del credere* com-
sion.(e)

[*43] *‡ A broker, though not acting under a *del
dere*, may by his mode of dealing render him
liable directly to his principal for the amount of goods:
Thus where the broker in his own name drew on the
chaser in favor of his principal a bill, which he transm
to his principal, he was held liable to him as the dra
the court remarking, that the broker by giving the bil
an end to all doubt as to the buyer's responsibility
that the vendors on receiving it dismissed from
minds all care about the solvency of the purchas
And again, where the factor gave his own promissory
to the principal for the amount of a sale, and did not

(e) *M'Kenzie v. Scott*, 6 Bro. P. C. 280, Tomlin's ed. ‡ The
is clearly right, but it arises at once out of the contract of *guaranty*
into by the agents, the guaranty being that the principal shall be p
that he shall receive good bills. See post, || 111, n. 3,|| as to the nat
del credere agency. || Story, J. speaking of this case, says :—" It is
easy to ascertain upon what precise point that judgment turned, as
sons are given by the House of Lords. But it may be gathered :
facts, that the principal controversy was, whether a factor with a
dere commission, was discharged from liability by remitting the a
his principal in an unproductive bill, payable to and endorsed by th
It was decided, that he was not ; and as it may be fairly presume
upon the common ground, that the factor was liable upon his endo
or, that the bill was not received as an absolute payment, so as to e
the guaranty. At all events, it is no rashness to assert, that it st
of the present question.:" i. e. as to the unqualified liability, in th
stance, of a factor acting under a *del credere*. *Thompson v. F*
Mason, 237.|| Substantially the same point was determined in
Groning, 7 Taunt. 164.‡

: (2) ‡ *Le Fevre v. Lloyd*, 5 Taunt. 749 ; and see *Goupy v. l*
Taunt. 159.‡

close the name of the purchaser until it was ascertained that the purchaser was insolvent, it was held, that he could not recover back from his principal the money which he (the factor) had been compelled to pay to an endorsee of the note.(3) †

*3. Though agents be not, except in the cases [*44] already recited, answerable for payments before they have been made to them, the actual receipt of money, on account of their principal, makes them in all cases accountable, and if called upon to transfer their principal's property by virtue of an authority given to a third person, it behoves them to examine the validity of such authority, for if that be forged, it will not protect any payments made under it.(f)

(3) † *Simpson v. Swan*, 3 Camp. 291. "If," says Lord Ellenborough in this case, "the principal draws before the sale, it is very reasonable that he should repay the money when the consideration fails on which the factor granted the acceptance. There the principal is deprived of no information, and is led into no error. But where after the sale, the factor without mentioning to whom he has sold, or what security he has taken, remits a bill of exchange or promissory note for the net proceeds, this naturally seems to close the transaction, and completely lulls the suspicion of the principal." †

(f) *Forster v. Clements*, 2 Campb. 17. (And see *Smith v. Mercer*, 1 Marsh. 453; 6 Taunt. 56, S. C.; *Rogers v. Kelly*, 2 Camp. 123.)

† In the case of *Wilkinson v. Johnson*, 3 B. & C. 428, the Court of King's Bench threw some doubt on the decision of *Smith v. Mercer*, or rather on the reasoning upon which it was founded—at all events, they were disinclined to press it further. *Smith v. Mercer*, was a case where a bill with a forged acceptance had been paid by the banker of the supposed acceptor, and the Court of Common Pleas decided, that the money so paid could not be recovered back by the banker. *Wilkinson v. Johnson*, was a case where money had been paid to take up a bill on the faith of a forged endorsement, by the bankers of the endorsee, and for his honor. And the Court of King's Bench allowed the bankers to recover back the money as paid under mistake. There does not seem, notwithstanding the ingenuity of Chief Justice Abbott, to be much distinction between the two cases in respect to the duty of respective bankers, but they are sufficiently distinguishable by this—that in the former case a week elapsed before the discovery took place; in the latter, notice of the mistake was given to the person to whom the money had been paid on the same day. And it is a general rule now sufficiently established, that to entitle the agent by whom the money has been paid to

[*45] *4. But losses occasioned by the fraud or failure of third persons, to whom an agent has given credit,

recover it back, notice must be given on the very day on which the payment is made. See *Cocks v. Masterman*, 9 B. & C. 902; *Daniels v. Lloyd*, 329. ¶ The importance of this decision warrants a fuller statement than has been given by Mr. Lloyd. The facts in the case and the principle decided appear from the opinion of Bayley, J. who delivered the judgment of the court. "This was an action brought by Cocks & Co. in London, to recover a sum of money paid by them to the defendants, on the ground that they, having paid the money in mistake and ignorance of the facts, were entitled to recover it back. The bill was presented to them on the 1st of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of Sewell & Cross. On the 2nd of May, the day on which it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, because they, being bankers, were bound before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand it was said that the plaintiffs, after having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of Sewell & Cross, and the case of *Johnson v. Johnson*, [*ubi supra*,] was relied on. That case differs from the present in one material point, viz. that the notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonor to the prior parties on that day. In the present case we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, when it becomes due, whether it is an honored or dishonored bill, and if he receive the money and is suffered to retain it during the whole of the day, the parties who paid it cannot recover it back. The holder is not bound by law, (if the bill be dishonored by the acceptor) to take steps against the other parties to the bill till the day after it is due. But he is entitled so to do, if he thinks fit, and the parties who paid it ought not by their negligence to deprive the holder of any right to do so. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of his right to take steps against the parties to the bill on the day when it was due." A bank, or banker, paying a forged check, must sustain the loss. See *Smith v. Mercer*, 6 Taunt. 76; *Smith v. Chester*, 1 Term Rep. 117; *Bank of United States v. Laborde*, 1 Binney; 27; *Bank of United States v. The Consol.*

pursuant to the regular and accustomed practice of trade, are not chargeable upon him : as the following instances exemplify.

A banker who had received bills of exchange from his correspondent to procure payment, instead of receiving payment in money, took the acceptor's check, and delivered up the bills. The check was dishonored ; but as it appeared that the banker had only pursued the usual course of business, Lord Kenyon declared himself clearly of opinion that he was not answerable for the event.(g)

The receiver of Lord Plymouth's estate took bills in the country, of persons who at the time were reputed to be of credit and substance, in order to return the rents in London. The bills were dishonored, and the money lost ; and yet the steward was held to be excused.(h) This was mentioned by Lord Hardwicke, in support of his opinion, that if a trustee appoint rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. And none of these cases, his Lordship observed, are on account of necessity, but *because the persons acted in the usual method of [*46] business.(i)(4)

In an action for money had and received, the facts were,

association, 4 Robinson's (Læ.) Rep. 190 ; *The President, &c. of the Gloucester Bank v. The President, &c. of the Salem Bank*, 17 Mass. Rep. 33 ; 3 Kent's Comm. 86, n. a.¶

(g) *Russell v. Hankey*, 6 T. R. 12.

(h) *Knight v. Lord Plymouth*, 3 Atk. 480. ¶ So an agent who places his principal's funds in the hands of a third person subject to his principal's drafts for the amount, is not liable for a loss of the funds by the insolvency of the depositary, if he has exercised reasonable prudence in the choice of the depositary. *Hammond v. Cottle*, 6 Serg. & Rawle, 290.¶

(i) *Ex parte Parsons*, Ambl. 219. And see 1 Br. Ch. R. 452 ; 3 Ves. Jun. 566 ; 6 Ves. Jun. 226, 266 ; 5 Ves. Jun. 331, 839.

(4) [The rule here laid down corresponds with that of the Civil Law, which is thus stated in the Digest : "*Si res pupillaris incursu latronum pereat, vel argentarius cui tutor pecuniam dedit, cum fuisset celeberrimus, solidum reddere non possit : nihil eo nomine tutor præstare cogitur.*" Dig. lib. xxvi. tit. 7, s. 50.]

that the plaintiff had engaged the defendant, as his agent, to receive money due to him from his customers, directed him to remit by the post a bill for these and other sums due to him. A bill was accordingly remitted to him by the post; but the letter was suppressed, and the money upon the bill received at the banker's by some unknown person, and was not recovered. Lord Kenyon said, "no directions been given about the mode of remittance, still, this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money received as agent, if it was so determined in Chancery forty years ago."*(k)*

However, it may be collected from a case recently decided in Chancery, that if an agent place his principal's money to his own account with his general banker without any mark by which it may be separated as belonging to the trust, and the banker fails, the agent will not be excused; because he cannot so deposit his principal's money as that, if the banker's solvency continue, he may be in a condition to treat it as his own, and if insolvency happen he may escape by considering it as belonging to his principal.*(l)*

(k) *Warwick v. Noakes*, Peake, N. P. C. 68.

(l) *Wren v. Kirton*, 11 Ves. Jun. 382. † And see *Massey v. Massey*, ante, p. 10, (2); *Fletcher v. Walker*, 3 Mad. 73; † || ante, p. 10. Preparatory to the final winding up of a trust, the agent and solicitor, trustee, paid the trust money to his bankers, to the credit of his general account with them, and informed the *cestui que trust*, that the money was lying idle at his bankers. The *cestui que trust* took no notice of the information; and more than a month afterwards the bankers failed. It was held that as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, and as the failure of the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money. *MacDonnell v. MacDonnell*, 7 Sim. 178. So, Walworth, Ch. says: "Executors and trustees must be made to understand that it is their duty to keep the funds of the trust separate and distinct from their other funds and business; that they must not, upon no consideration, use the trust moneys themselves, or permit them to be mingled with their own moneys or property. In no other way can they save themselves from trouble, litigation and censure. If they neglect this obvious duty, they have no reason to complain if they meet

And a loss occasioned by an unauthorized disposal or adventure of the principal's money, and not prescribed by the usage of business, though intended for his benefit, is chargeable to the agent.(*m*)

SECTION 9.

It is one of the chief duties, and is implied in the contract of an agent, to keep a clear account, and communicate the results of it from time to time; and, when called upon, to account without suppression, concealment, or overcharge.(*a*) It has been laid down as a rule in the Court

and expense, and sometimes with heavy loss. The protection of the rights of those who are not in a situation to protect themselves, makes it the duty of courts of justice to require fiduciaries to make good all losses which have been occasioned by their neglect." *Case v. Abeel*, 1 Paige, 402. Abbot, C. J. in a case at Nisi Prius, disposes of the subject, so far as he assumes to do so, in a satisfactory manner. He says: "There are three modes which a person may adopt, when the money of others is placed in his hands. The first is, for him to keep it in his own house; what the consequences of that mode are, it is at present unnecessary for me to state. Another mode is, for the party to pay it into his banker's, on his general account; but the third, and the correct mode is, for the party to open a new account in his own name for this particular purpose. The defendant should have paid the money into a banker's hands, by opening a new account in his own name, 'for the credit of Robinson's estate,' and so to earmark the money, as belonging to that estate: then it would have been kept separate. But if the person having the money mixes it with his own, he thereby makes himself personally debtor to the estate. Here the defendant has mixed the money with his own, by paying it to the credit of his private account at his banker's; and he is, therefore, liable in this action. This is a very hard case, and all suspicion against the defendant is quite out of the question; but one of two innocent parties must lose the money, and under the circumstances of this case, I think, that the plaintiff is entitled to a verdict." A verdict was rendered accordingly. *Robinson v. Ward*, 2 Carr. & Payne, 59; S. C. Ryan & Moody, 274.¶

(*m*) Ante, Ch. I. Part I. Sec. 2, ¶ p. 3. n. (*a*)¶

(*a*) *Lord Chedworth v. Edwards*, 8 Ves. Jun. 49; *Lord Hardwicke v.*

of Chancery, not to be departed from but upon very special circumstances, that an agent is bound to keep regular accounts of his transactions on behalf of his employers: not only upon his own part, account of payments, but also on the part of his employers, account of his receipts. (b) And an account has been decreed after a lapse of more than twenty years. (c) (1) Where an agent has for many years neglected to keep accounts, and

Vernon, 14 Ves. 510; + *Topham v. Braddick*, 1 Taunt. 572. || In a circumstance that the agent is a professional man, renders it the more imperative upon him to be cautious in this respect. "As a professional man must have known that it was his duty to keep a regular account of receipts and payments." *Jenkins v. Gould*, 3 Russ. 393; *Philips v. Llewellyn*, 2 Edw. Ch. Rep. 16. A refusal to render an account lays the agent to the most unfavorable presumptions. *Pope v. Barret*, 1 Mason, 181. The duty to account does not, however, depend upon a demand for an account having been made; it may arise from the nature of the transaction itself. So, in *Clark v. Moody*, 17 Mass. Rep. 145. Parker, C. "It is also the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient: so that a factor abroad, who should have goods to sell, without special directions as to the mode of remittance, may be held, according to this course of business, to give his principal a statement of his progress in the transaction; and if he should neglect to do so, he is liable to forward his account to his employer, this negligence will be a breach of the contract and subject him to an action." See *Reid v. Selaer Glass Factory*, 3 Cowen, 437; *Dodge v. Perkins*, 9 Pick. 211. (b) *White v. Lady Lincoln*, 8 Ves. 369; (*Morgan v. Lewes*, 10 Ves. 321. Rep. 52.)

(c) *Lady Ormond v. Hutchinson*, 13 Ves. 47, 53; || *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & Cr. 41. An instructive case on this respect. ||

(1) [Where a reasonable time has elapsed, and the circumstances repel the presumption, a jury may presume that a principal has not received an account, and that the agent has accounted. In *Topham v. Topham*, supra, ||n. (a),|| the space of fourteen years was considered sufficient ground for an inference that an account had been rendered and payment made of the sum due on the footing of the account.] On the other hand, if a servant has left his service for a considerable time, the presumption is, that all his wages have been paid. *Sellen v. Norton & Payne*, 80. It will appear in the sequel that there are many analogies between the law of principal and agent, and that of master and

withheld part of his principal's money, an injunction was granted to restrain the transfer of the whole of certain stock, discovered to have been invested in his own name, till he should distinguish upon oath how much of it was bought with the money of his principal.(d) And this principle will be found to be established, by many authorities, as a settled rule of equity, that if an agent, whose duty it is to keep the property of his employer separate, mix it with his own, it lies upon him to distinguish them, and if he cannot distinguish what is his own, the whole is to be considered as belonging to the other.(2)

*An inferior agent, however, is only accountable [*49] to his immediate employer, and not to the principal.(e)

(d) *Lord Chedworth v. Edwards*, 8 Ves. 48; *Lupton v. White, Panton v. Panton*, 15 Ves. 436.

(2) † See *Wren v. Kirton*, *Fletcher v. Walker*, and *Massey v. Banner*, ante, p. 10, (2).† ¶ So, Kent, Ch. says: "The rule of law and equity is strict and severe on such occasions. If a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear." *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 108; 2 Kent's Comm. 364; Story on Bailments, § 40. "Courts of equity do not, in these cases, proceed upon the notion, that strict justice is done between the parties; but upon the ground, that it is the only justice there can be done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal." 1 Story's Eq. § 468. So upon the same principle, where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods; as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract. *Jackson v. Baker*, 1 Wash. C. C. Rep. 394, 445; S. C. 6 Cowen, 183, n. (a)¶

(e) *Cartwright v. Hately*, 1 Ves. Jun. 292; ¶ *De La Viesca v. Lubbock*, 10 Sim. 629. Ante, p. 7, n. b.¶ † *Pinto v. Santos*, 5 Taunt. 447. That was a case where money had been paid into a bank by an agent, who was charged with the receipt of certain sums, to be afterwards distributed in certain proportions, and it was held, that the banker, though aware of the nature of the interest, was, after a portion of the money had been drawn

2. The principal is in general entitled, not only to the bare amount of what has been received by his agent, but also (except waived by express or implied consent) to

out, accountable to the agent only by whom the disposal had been made and not to any of the individual proprietors of the fund. See also *Schmal v. Tomlinson*, 6 Taunt. 147.

|| Where an agent has duly and fairly accounted with his immediate authorized principal, he is not bound to account over again to a person beneficially interested, or standing in the relation of *cestui que trust* to principal. *Tripler v. Olcott*, 3 Johns. Ch. Rep. 473. *Murray v. Toland*, 574. John, an attorney, who was accustomed to receive certain dues for plaintiff, his client, went from home, leaving the defendant Badcock clerk, at the office; who in the absence of his master, received money and account of the above dues for the client, (which he was authorized to do) and gave a receipt signed, "For Mr. S. John, John Badcock." John died in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to the defendant. The defendant afterwards refused to pay the money over to the client, and on *assumpsit* brought against him for money received, it was held that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master on the other hand being answerable to the client for the sum received by his clerk, and there was no privity of contract between the present plaintiff and defendant. *Stephens v. Badcock*, 3 Barn. & C. 354. So, A. & B. and others, were owners of a ship in the service of the East India Company. B. was the managing owner, and employed C. as his agent for general purposes, and among others to receive and pay moneys on account of the ship; and C. kept a separate account in his books with B. as such managing owner. To obtain payment of a sum of money due from the East India Company in account with the ship, it was necessary that the receipt should be signed by one or more of the owners, by the managing owner, and upon a receipt signed by B. and one of the owners, C. received on account of the ship £2000 from the company and placed it to B.'s credit in his books as managing owner. The party C. having brought an action for money had and received, to recover from the company the balance of that account, it was held that he had received the money as the agent of B. and was accountable to him for it; that there was no privity between the other part owners and C., and consequently that the action was not maintainable. *Sims v. Brittain*, 4 Barn. & Ad. 375.

A factor receiving goods to be sold, cannot, after a length of time and acquiescence, defend himself from a suit by his immediate principal, by showing that the immediate principal was merely an agent for another person against whom such factor had a defence or set-off. *Murray v. Toland*, 574. Johns. Ch. Rep. 574.||

the increase which has been made from his property.(f)(3) Therefore agents are liable for interest, if any have been actually made, upon a balance in their hands ; or if they mix it with their own, and make use of it, unless the nature of the employment implies the consent of the principal to the enjoyment of this *benefit by the [*50] agent.(g) It was held, indeed, in one instance, by Lord Thurlow, that an agent was not liable for interest upon money retained in his hands, though he had employed it at interest.(A) But that case, resting upon very particular circumstances, is by no means inconsistent with the general rule ; for the agent had regularly and duly informed his employer of the money in his possession, and had, at his desire, kept a large balance always by him.(h) So after a great lapse of time, and the accumulation known to the principal, interest has been denied.(i) And no interest is due upon money which has lain dead in the hands of an agent.(k)

(f) *Brown v. Litton*, P. Wms. 141.

It is the practice of the Court of Chancery to make receivers pay interest upon balances in their hands if they do not pass their accounts regularly. — *v. Jolland*, 8 Ves. 72. || Nor, though he passes his accounts and pays his balances regularly, is he entitled to make interest, for his own benefit, of moneys which come into his hands in his character of receiver during the intervals between the times of passing his accounts. *Shaw v. Rhodes*, 2 Russ. 539.||

(3) [A usage authorizing an agent to make a profit by a bill upon his principal, being a usage of “fraud and plunder,” cannot be supported. Thus, where the master of a ship in a foreign port, from the state of the exchange, received a premium for a bill drawn upon England on account of the ship, this premium was held to belong to the owner, notwithstanding any usage which there might have been for masters of ships to appropriate such premiums to their own use. *Diplock v. Blackburn*, 3 Campb. 43.]

(g) *Rogers v. Boehm*, 2 Esp. Cas. 704, per Lord Kenyon.

(A) || In *Docker v. Somes*, 2 Myl. & K. 673. Lord Brougham tells us, that “Lord Thurlow leant less hardly against trustees than any other judge.”||

(h) *Lord Chedworth v. Edwards*, 8 Ves. 48.

(i) *Beaumont v. Boulton*, 11 Ves. 360, but allowed from the time of filing the bills.

(k) *Rogers v. Boehm*, 2 Esp. Cas. 704, per Lord Kenyon. || So, an at-

[*51] *If no account have been kept, and money which can be ascertained to belong to the principal has

torney at law, employed as agent for the sale of lands, receiving the proceeds of sales, and refusing to pay them over to persons not lawfully qualified to make the demand was held, under the circumstances of the case, not liable for interest. Kent, Ch. said :—" He [the defendant] received money, not strictly as a trustee, in confidence and without interest as an attorney, or agent, or bailiff, instructed to cause the land to be sold in his discretion, and to collect and receive the money. It was sufficient if he kept the money safely, and paid it according to the request of the party entitled to demand and receive. His duty was, to be ready to pay upon demand ; and I think it would be too rigorous a doctrine, unless under very special circumstances, which do not exist in this case, to exact from an attorney or agent, interest upon the moneys of their principal in such cases when they are not chargeable with any default, and are ready to pay when called upon for that purpose. If the agent had received moneys, and neglected, for a long time, to inform his principal of the fact, and wilfully suffered him to remain in ignorance that the debtor had paid to the agent, there would be equity in requiring the agent to pay interest, for here there would be a case of default and breach of duty. But there is no averment in the present case, of a want of notice [from the agent,] and, therefore, interest is not to be presumed. So, if the agent had employed the money for the purpose of gain to himself, a ground might be laid for the charge of interest. See *Williams v. Storrs*, 6 Johns. Ch. Rep. 653, 658. In this case the defendant admitted that the moneys received by him in the course of his business were mixed up with his other moneys, but he denied that the same were laid out, or invested, or used in any operation of profit or speculation, or put at interest, or to any productive use whatsoever. Although not stated in the report, it must be inferred that the cause was heard upon the defendant's answer. ¶ There are some agents who are bound to invest the moneys which may come into their hands, and who are consequently liable for interest, whether it has been actually made or not. Such are trustees, receivers, &c. See 6 Mad. 155 ; 4 Dow, 209 ; 1 Ball & B. 219, 385 ; 3 C. 107. *A fortiori*, therefore, where there has been fraud or misconduct in such dealing with the fund as that a profit has been derived from it by the holder. See 12 Ves. 402 ; 1 M'Clel. & Y. 427 ; 1 Russ. 146, 301. The Chancellor, whose stern and inflexible adherence to the great principles of the administration of equity jurisdiction, extorts our admiration, expressed himself in relation to the particular points involved in the note of Mr. M. in the English editor, very satisfactorily, in the two following cases. In *Dunscomb v. Dunscomb*, 1 Johns. Ch. Rep. 508, 510, the chancellor said :—" The plaintiffs are entitled, of course, to the sum of, &c., and the point, on this part of the case is, whether they are entitled to interest upon that sum, which has been unproductive, for many years, in the hands

been laid out in a specific property, it seems that the agent

defendants. Why it was not paid to the guardian of the plaintiffs, does not appear. The executors say it has always been kept in readiness to pay to the persons entitled, when demanded. But this is no sufficient excuse. If they had met with any real doubt or difficulty, as to the person authorized to receive, they could have applied to the court for advice, or brought the money into court. If the money, (as we are at liberty to suppose,) has been mingled with their own moneys, it has answered the purpose of credit, and the rule is settled, that executors and all other trustees, are chargeable with interest, if they have made use of the money themselves, or have been negligent, either in not paying the money over, or in not investing it, or loaning it, so as to render it productive. The rule is founded in justice and good policy ; it prevents abuse, and it indemnifies against negligence." And see *Schieffelin v. Stewart*, 1 Johns. Ch. Rep. 620.

In the next case alluded to, (*Brown v. Rickets*, 4 Johns. Ch. Rep. 303, 305,) Kent, Ch. says ; " It is the established doctrine of the court, that an executor, or other trustee, cannot be permitted to convert trust funds to his own use, without being responsible for the profits of the money. He is not to make any gain to himself from the use of the funds, but it must all be accounted for to the *cestui que trust*. So, if an executor, or other trustee, mingles the trust moneys with his own, so as to answer the purpose of credit, or if he puts the money in jeopardy, by involving it in the risk of his trade, he must answer for what it may reasonably be supposed to have made. I have had occasion frequently to lay down this rule ; and it may be declared to be a principle of universal law, that a tutor, curator or trustee, shall not make a profit of the trust money, and then retain the profits. Whatever interest the trustee made ought to be paid. Though it should even be proper to keep the money in deposit, yet if he did, in fact, make interest of it, he ought to pay it. He must not, in any event, be a gainer by his employment of the trust fund. I am surprised, that this point should be again drawn into question, after what has been said and ruled in this court, and considering how fully and explicitly the doctrine has been established in the English Chancery."

In *Duncomb v. Duncomb*, *ubi supra*, it was proper to ascertain the period from which the executors and trustees should be charged with interest upon funds lying unproductive in their hands. As to this point Kent, Ch. says : " The defendants must, in this case, account for interest on the above principal sum ; and as to the time from which interest is to be computed, in such a case of negligence in suffering the money to lie idle, there does not appear to be any absolute rule, and the time must vary according to circumstances. It would be laying too heavy a hand upon executors to charge interest from the moment money was received. In some cases executors are allowed a year to look out for some due appropriation of the money, and in other cases it would be unreasonable. Here the executors

will be deemed in equity a trustee for the principal as to that property.(1)

3. And not only interest, but every other sort of profit or advantage clandestinely derived by an agent, from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for.(A) So the

show no pains or effort to discharge themselves of the money. I observe that six months was the time allowed, in a like case, by the civil law, the tutor to invest the funds ; and if the defendants are charged with interest after six months from the time they received it, [them] it will not be unreasonable in this case, and I shall accordingly direct it." The foregoing cases explain the difference between a trustee, who, (for such is the nature of every direct trust) has the legal estate in the subject of the trust ; and a mere agent, depositary or stakeholder, whose business it is merely to hold the money ready to be paid to the party authorized to demand it.

Where an assignee of property in trust for the benefit of creditors has received the proceeds of the property, neglected for many years to distribute it among the creditors, he was decreed to pay the amount with interest. Kent, Ch. says: "The defendant renders no sufficient excuse for not distributing this fund. He appears to have been guilty of negligence, and does not show what he did with the fund in the mean time. The presumption is that he appropriated it to his own use. He is justly chargeable with interest on the fund, from the time it was converted into cash, and with the costs of suit." *Gray v. Thompson*, 1 Johns. Ch. Rep. 82. And see *Maley v. Carr*, 4 Beav. 49. *Clarkson v. De Peyster*, Hopkins, 424.||

(1) Semb. per Lord Chancellor, 8 Ves. 49.

(A) || If a trustee mixes trust funds with his private moneys and enters both in a trade or adventure of his own, the *cestui que trust* may, if he offers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. Lord Brougham, deciding this point, admits indeed, that it was a question of novelty, but ably vindicates his judgment both by reason and from analogous cases. He says ; "In the absence of any precedent a decree for an account of profits, whatever may have been the culpability of the trustee in exposing the trust funds to hazard, in quest of his own gain, there seems good reason for holding that, as far as the authority of judicial determination goes, the weight lies on one side, and that the rule is, to give interest and profits as well as in cases of this kind. Let us, however, refer for a moment to the established principles that regulate the dealings of the court with breaches of trust, and see to what these plainly lead us.

"Wherever a trustee, or one standing in the relation of a trustee, breaches his duty, and deals with the trust estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain which he has

Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee, who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner (and cases of this kind are more numerous) where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself; yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases, it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. [An idea borrowed from the Roman law, as to which see Dig. lib. 17, t. 1, l. 20; Story on Bailm. § 99, 194.] So, it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held a trustee for my benefit; and so an attorney, guardian, or other person standing in a like situation to another gains not for himself, but for the client, or infant, or other party whose confidence has been abused.

“Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that caused it; punished by charging all losses on the wrongdoer, while no profit can ever accrue to him—can the court consistently draw the line as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent; those instances where the trustee is most likely to misappropriate; namely, those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult, where a great proportion of the gains proceeded from skill or labor employed upon the capital. In cases of separate appropriation there was no such difficulty; as where land or stock had been bought and then sold again at a profit; and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust

money in that trade along with his own, there was so much difficult severing the profits which might be supposed to come from the money applied from those which came from the rest of the capital embarked, it was deemed more convenient to take another course, and instead of endeavoring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profit and assign that to the trust estate.

“ This principle is undoubtedly attended with one advantage ; it avoids the necessity of an investigation, of more or less nicety, in each individual case, and it thus attains one of the benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation of profit equally, whatever may be the real gain derived by the trustee in his breach of duty, nor can any amount of profit made be reached by the court, or even the most moderate rate of mercantile profit, that is the rate of interest, be exceeded, whatever the actual gains may have been unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest ; and this without the least regard to the profits actually realized.—But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this court, in the most wholesome and indeed necessary exercise of its functions, as an encouragement thus held out to fraud and breach of trust. What avails it towards prosecuting such malversations, that the contrivers of sordid artifices feel the power of the court only where they are clumsy enough to have the gains of their dishonesty severed from the rest of their stores ?—the supposed difficulty of ascertaining the real gain made by the misappropriation is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction. Even if cases were more likely to occur than we can think they are, of inextricable difficulties in pursuing such inquiries, we should still deem this the lesser evil by far, and be prepared to embrace it.”

After an examination of authorities the lord chancellor proceeds : “ the parties whose funds have been misapplied should, in every case, have their option of receiving either the actual profits made, or interest at a fixed rate per cent according to circumstances, appears a rule exposed to no objection ; and although the court, moved by special circumstances, may allow rests with compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits.—Should in any case a serious difficulty arise in tracing and apportioning the profits, this may be a reason for preferring a fixed rate of interest in that case. Nor can any argument be raised upon the inconvenience of going into the special circumstances in each instance ; for even according to the course pursued in the cases I have referred to, this kind of inquiry is indispensable. The lordship concludes his judgment thus : “ When did a court of equity, whether administered according to the rules of equity or of law, ever refuse to a wrongdoer’s argument to stay the arm of justice, grounded on

he himself had successfully taken to prevent his iniquity from being traced? Rather let me ask, when did any wrongdoer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome? The answer is, 'the court will try.' " *Dorker v. Somes*, 2 Myl. & K. 655. A considerable part of Lord Brougham's decision in the above case is cited by Mr. Justice Story, whose quotation includes some passages which the editor has omitted; but omits the concluding passages which the editor has inserted above. 1 Story's Eq. Jurisp. § 465, n. 1. Executors were charged with the profits made by them from the employment of the testator's assets in any trade or business since the testator's decease. *Palmer v. Mitchell*, 2 Myl. & K. 672, n.; and see *Williams v. Littlefield*, 12 Wend. 369; *Steele v. Bahcock*, 1 Hill, 530.

But notwithstanding what is said by Lord Brougham, (*ubi supra*,) may not the principle of allowing rests, be the rule if the *cestui que trust* choose to adopt it, with this qualification that the trustee may be allowed to show that he did not make compound interest on the trust fund; and this, if he has kept regular accounts, and his course of proceeding has been fair and ingenuous, it must be presumed that he would almost always be able to do. So, far as the language of Lord Brougham applies to the point in issue before him, it does not disaffirm the right of the *cestui que trust* to rests, or in other words, compound interest; and may well be intended as giving the *cestui que trust* an option of carrying the inquiry as to profits beyond compound interest. There must be cases in which the making rests is the only way the *cestui que trust* can attain his rights. Suppose the trustee has \$100,000 invested in such manner as to produce 6 or 7 per cent per annum, would it not be monstrous negligence in the trustee not to exert himself to invest the annually accruing 6 or 7000 dollars in such a manner as to become a new principal for new interest to accrue on? If by barely investing the money in productive stock, or upon bond and mortgage, the trustee may thus constantly increase the principal by the annual accretion of interest—without risking either principal or interest—then, where is the hardship in assuming that he must have made, at least as much, when he hazarded both the principal, and the interest, which a due regard to his duty would have produced from it, in his own trade and speculations. The English chancellor would, certainly never have denied this proposition.

We have, however, on this subject, the opinion of a learned chancellor of our own, who, in all candor, and without any feeling of national vanity, must be deemed to rank at least equal to Lord Brougham as an equity judge. In *Schieffelin v. Stewart*, 1 Johns. Ch. Rep. 620, the master in taking an account between administrators and the parties beneficially interested in the trust, allowed yearly rests; and on overruling exceptions to the report, Kent, Ch. said: "No just complaint can be made of the time from which the computation of interest began. The plaintiff was allowed nearly two years to settle the estate, without being chargeable with interest. For a considerable part of that time he had a large balance in hand, and the time

was amply sufficient in this case, to close the concerns of the administration, and the debts were all paid within that time, with one or two trifling exceptions. It was the duty of the plaintiff from that time forward, to have made distribution of the assets, or placed them in a situation to become productive and to accumulate for the heirs. He did neither, but employed the money in his own business, or trade, or in making large loans for his own benefit; and as he has not disclosed (as he might have done to the master) what were the profits of the assets so employed, it appears to me, as well on principle as on authority, that he is justly chargeable with the interest contained in the report. The only way for the plaintiff to avoid this conclusion, was by fairly disclosing what he had made of the use of the money. The courts were, anciently, quite lax on the subject of these personal trusts, and allowed executors to convert the money of the testator to their own use, without any account for interest. This must have been the source of great abuse, and was unjust toward *cestui que trust*. With such a pecuniary privilege, the office of trustee, as Lord Loughborough expressed himself, would be canvassed for.

“ In *Newton v. Bennet*, (1 Bro. 359,) the executor mixed the testator's money with his own, and applied it in the course of his trade; and the master taking the account made rests every year, and reported a large balance against the defendant; and the question was, whether he should have interest *for the sums, from time to time, in his hands*, and it was decided that he should. In this case I should conclude, that compound interest should be allowed, though the making of periodical rests, in taking an account, does not, of itself, imply it. Whatever might have been the fact in the case above cited, it is certain that the allowance of compound interest is essential to carry into complete effect the principle of the court, that no profit, gain, or advantage, shall be derived to the trustee from the use of the trust funds. All the gain must go to the *cestui que trust*. This is the true equity doctrine. It secures fidelity, and removes temptation; and is the ground of this allowance of annual rests, in the taking of the account, when the executor has used the property and does not disclose the profits he receives.

“ But there are cases which not only contain the general principle, but also show a trustee using the trust money must account for all the profit of it, in order to reach that profit when it is not otherwise ascertained, that is, the very rule of computation contained in the report before us.—It will not be easy here to show the injustice to the infants in denying compound interest, and the direct gain that would be permitted to the plaintiff. In July 1805, he had in hand 33,000 dollars of moneys belonging to the infants, and no debts to pay. In July 1806, he received (as we must presume) the use of that fund, in his trade, and by his loans, at least, the simple interest, or 2310 dollars. That sum he will then retain in his business for nine years, or to the taking of the account, free of interest. The next year, or July 1807, he receives another year's interest, and will then have in hand, of interest, 4620 dollars, to be used for his own advantage, for the next years free of interest. The third year he will have in hand near 7000

if an agent, who has purchased goods according to order, sell them again to advantage, with a view of appropriating the gain to himself, although he should have answered the loss, if any, *(m)* yet his employer is entitled to the profits. *(n)* For such conduct is a fraud, from which no advantage can be derived to the person practising it. *(o)* It is said, however, to have been resolved, that a covenant by a factor *to account for goods, or the produce thereof*, does not prevent him from converting the stock of his principal to his own use, provided he answer it out of his own. But it is probable that this resolution *turned upon the [*52] particular terms of the covenant, and the form of the breach alleged in support of the action to which the resolution applied. *(p)*

Notwithstanding an account stated and settled *(A)* under

lars to be retained for seven years, without interest, and so down to the date of the report. The fund instead of accumulating for the benefit of the infants, accumulates for his benefit. In this way, as Lord Eldon observed, the property would be nearly as beneficial to the executor as to the infant, and this would overthrow the principles of the court. Such a consequence cannot be endured. A man in trade could afford a large premium for letters of administration upon a rich estate, especially, if the infant heirs were very young. What temptation would thus be held out to delay and negligence in rendering an account! What inducements to trustees to employ the trust moneys in their own private speculations and trade, to the hazard of the whole fund." The chancellor must be deemed as restricting his observations to cases of fiduciary relation; and to prevent their being extended too far, he adds: "In the ordinary case between debtor and creditor, compound interest is not recoverable." A somewhat different view of the subject, as to charging a trustee with compound interest, appears to be taken by a later chancellor of New York. *Clarkson v. DePeyster*, Hopk. 424. See *Hughes v. Smith*, 2 Dana's (Ky.) Rep. 251.¶

(m) *Malyns*, 154.

(n) *Beawes*, 43; *Massey v. Davies*, 2 Ves. Jun. 317.

(o) *Beaumont v. Boulbee*, 7 Ves. 608, 617; 5 Ves. 485, S. C. † See note *(k)*.‡

(p) *Shepherd v. Maidstone*, 10 Mod. 144.

(A) *Perkins v. Hart*, 11 Wheat. 587. An account current sent by a foreign merchant to a merchant in this country, and not objected to for two years is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection. *Freeland v. Heron*,

hand and seal, and the balance received by the principal and even a release, he may, by application to the Court of Chancery, || on bill filed for the purpose, and proceeding according to the course of the court, || be allowed to set aside the account, charge and falsify the account, upon an allegation of error subsequently discovered. (q)

7 Cranch, 147. Marshall, C. J. says: "No practice could be more dangerous than that of opening accounts which the parties themselves have justified, on suggestions supported by doubtful or only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake of position, and ought not to be obligatory upon the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to be correct." *Chappederlaine v. Dechenaux*, 4 Cranch, 306. And McCoun, V. C. in a valuable opinion which will be referred to in another note, for another purpose, says: "As a general rule, when an account is made up and rendered in due form, he to whom it is rendered is bound to examine the same, or to procure some one to examine it for him; and if he admits the account to be correct, it becomes a stated account and is binding upon both parties, the balance being the debt, which may be sued for and recovered at law on the basis of an *insimul computassent*. So, if instead of an express admission of the correctness of the account, the party receiving it keeps the same by him, and makes no objection within a reasonable time, he is considered from his silence, as acquiescing, and is equally bound by the stated account. And whenever the balance appearing to be due on the stated account is paid, it then becomes a settled account. [See further to the distinction between stated and settled accounts, Story's *Equity Jurisprudence*, 798.] This is the result of the agreement and acquiescence of both parties in the correctness of the accounts, and of their concurrent acts—the one in paying and the other in receiving the balance. If either party attempts to impeach the settlement and to open the accounts for re-examination wholly or in part—and which can only be done on the grounds of mistake, or error—the burthen of proof rests upon the party impeaching, and he must prove the fraud, or point out the error, or mistake, on which he relies. These are the plain and familiar rules which govern in such cases." *Philips v. Belden*, 2 Edw. Ch. Rep. 1, 13; *Bullock v. Hoff*, Ch. Rep. 294, 298; *Farnam v. Brooks*, 9 Pick. 212, 228; *v. Pickering*, 2 Beav. 31. ||

(q) 1 Eq. Ca. Ab. 12, cites 3 Ch. Rep. 18; 7 Ves. 599; *Clegg v. Goulden*, 9 Ves. 266. || It may not be improper in this place, to give an explanation of these technical terms of courts of equity, to

But specific errors must be pointed out, even where there

charge and falsify," Mr. Justice Story says, (Eq. Jurisp. vol. 1, § 525,) "these terms, 'surcharge,' and 'falsify,' have a distinct sense in the vocabulary of courts of equity, a little removed from that, which they bear in the ordinary language of common life. In this language of common life, we understand 'surcharge' to import an overcharge in quantity, or price, or value, beyond what is just, correct, or reasonable. In this sense, it is nearly equivalent to 'falsify;' for every item, which is not truly charged, as it should be, is false; and by establishing such overcharge, it is falsified. But, in the sense of courts of equity, these words are used in contradistinction to each other. A *surcharge* is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be allowed. A *falsification* applies to some item in the debits; and supposes, that the item is wholly false, or in some part erroneous." The distinction between surcharging and falsifying, and opening an account at large, are explained by McCoun, V. C. in a case referred to in a previous note. (*Philips v. Belden*, 2 Edw. Ch. Rep. 23.) He says: "In order to understand clearly the application of the terms 'surcharge' and 'falsify,' and the difference between this course and taking an account generally, it is well to observe, that when liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account, and establishes it as such. If either party can show an omission, for which an entry of debit or credit ought to be made, such party surcharges, that is, adds to the account, and if anything should be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge or falsification; and if he fails to prove it, the account must stand as correct. It is presumed to be correct, after having been once settled, until the contrary appears. Here lies the difference between this and a general accounting: for in the latter, the party producing the account must show the items to be correct." And see *Perkins v. Hart*, 11 Wheat. 237; *Farnam v. Brooks*, 9 Pick. 218; *Bullock v. Boyd*, 1 Hoff. Ch. Rep. 294.

A stated, or settled account, is a defence, by way of plea or answer, to a bill for an account; still it is not conclusive. On this point Mr. Justice Story observes: "But, if there has been any mistake, or omission, or accident, or fraud, or undue advantages, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties; but will allow it to be opened and re-examined. In some cases, as of gross fraud, or gross mistake, or undue advantage or imposition, made palpable to the court, it will direct the whole account to be opened, and taken *de novo*. In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the court will content itself with a more moderate exercise of its authority. It will allow the ac-

is an express exception of errors ;(r) unless it appear upon the face of it to be a defective account.(s) Independent of error, it requires very strong grounds to open settled accounts.(t) Fraud, however, is a sufficient ground.(t)

count to stand, with liberty to the plaintiff to surcharge and falsify it ; effect of which is, to leave the account in full force and vigor, as a stated account except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes. Sometimes, a still more moderate course is adopted ; and the account is simply opened to contestation, as to one or more items, which are specially set forth in the bill of the plaintiff, as being erroneous or unjustifiable ; and, in other respects, it is treated as conclusive." 1 Story's Eq. § 523, and cases there cited.

Where a bill is filed for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill ; as he will not be permitted to show error in the stated account, at the hearing, where there is no allegation in the bill, of any such error. The stated account is, *prima facie*, a bar, until the particular errors in it are assigned. *Weed v. Smu* Paige, 573.

Where it is sought by bill in equity to open an account which has been settled, the plaintiff must distinctly charge the error, imposition or fraud relied on, specifying the particulars ; if he does not do so, but files a bill generally for an account, and the defendant pleads a settlement as to a portion of the accounts, and the plea is ordered to stand for an answer, the plaintiff cannot by an amended bill, charging specific errors, compel an answer to so much of the bill as is covered by the plea, if in the second answer, all errors in the accounts covered by the plea are denied. *Lea v. Dempsey*, 15 Wend. 83.||

(r) *Taylor v. Haylin*, 2 Bro. C. C. 310 ; *Dawson v. Dawson*, 1 A. C. 3 Bro. C. C. 266 ; *Lord Hardwicke v. Vernon*, 14 Ves. 510. || The omission of "errors excepted" will not prevent its being a settled account. 1 Story's Eq. Pl. § 800.||

(s) *Matthews v. Wallwyn*, 4 Ves. 125.

(t) 5 Ves. 837 ; *Ib.* 485 ; || *Farnam v. Brooks*, 9 Pick. 212 ;|| & *Earl Hardwicke v. Vernon*, 14 Ves. 504. Where there has been a settlement, there is generally no limitation of time for re-opening the account. *Row v. Rhineland*, 1 Johns. Ch. Rep. 550, 557. As a general rule, the lapse of time is not sufficient, in equity, to preclude an investigation in a matter of fraud. *Prevost v. Gratz*, 6 Wheat. 481 ; *Marks v. Pell*, 1 Johns. Ch. Rep. 598 ; *Baker v. Whiting*, 3 Sumn. 486. The Revised Statutes of New York, vol. 2. (2d ed.) p. 229, § 51, have limited the time for a bill for relief on the ground of fraud to six years "after the discovery by the aggrieved party, of the facts constituting such fraud, and not after the time."||

4. Joint factors are liable for each others receipts ; and it is no discharge of one of two joint factors, that the business was wholly transacted by the other with the knowledge of the *principal.(u) And as a joint con- [*53] signment makes each liable to account for the whole, so where two agents, though residing in different places, agree to share the profits of their respective commissions, they become liable by such agreement as joint agents to all persons with whom each may contract as agent, notwithstanding that their agreement between themselves provides that neither shall be liable for the acts or losses of the other, but each for his own.(w)

And a discharge of one joint factor is a release of the other.(x)

A surviving partner must account for himself and his

(u) *Godfrey v. Saunders*, 3 Wils. 73 ; *Goore v. Daubeny*, 2 Leon. 75, 75. And see Cowp. 814, *in notis.* || *McIlreath v. Margetson*, 4 Doug. 278. One joint agent paying a demand to a person not entitled, and obliged to pay it to the rightful claimant, cannot have contribution from his co-agent. *Ibid.* ||

(w) *Waugh v. Carver*, 2 H. Bl. 235. ‡ But where upon a dissolution of partnership one of two joint consignees had assumed the disposition of the goods consigned, he was held liable for the proceeds of the sale in an action brought against him singly for *money had and received.* *Wells v. Ross*, 7 Taunt. 403. A joint action might have been maintained against *both* for *not accounting.* ‡

(x) Bro. tit. Charge, pl. 49 ; 3 Wils. 106 ; 2 Leon. 77, *arg.* || It is a well established rule, that, *at law*, the release of one co-obligor, whether bound jointly, or jointly and severally, or of one joint debtor, is a release of the other co-obligors or joint debtors. But then it must be a strict technical release, *under seal* : a receipt, or acquittance, or covenant not to sue will not have the effect. One joint debtor may, clearly, assent to the release of the others, and still continue his own liability : and *in equity*, a release is not so effective as at law. *Rogers v. Hosack's ex'rs*, 18 Wend. 319. *Kirby v. Taylor*, 6 Johns. Ch. Rep. 242. *Kirby v. Turner*, Hopk. 309. *Rowley v. Stoddard*, 7 Johns. Rep. 207. *The President &c. of the Bank of Catskill v. Messenger*, 9 Cow. 37. *Bank of Chenango v. Osgood*, 4 Wend. 607. *De Zeny v. Bailey*, 9 Wend. 336. *The United States v. Astley*, 3 Wash. C. C. Rep. 512. *Hunt v. Rousmaniere's Adm'rs*, 1 Peters, 2. As to the distinction between a release and a covenant not to sue, see *Kirby v. Taylor*, 6 Johns. Ch. Rep. 250.¶

deceased partner ;(y) and upon the death of one of two joint principals, the remedy belongs to the survivor alone.(z)

‡ An agent when called upon to account cannot dispute the title of his principal.(A) Thus an insurance [*54] broker who had effected a policy on a ship in the name of a partnership, and upon a loss happening had received the money in his character of broker, was held accountable for that money to the surviving partner although the partnership had no legal title to the vessel and although the broker himself was, as mortgagee, sole registered owner.(4)‡

(y) Eq. Ca. Ab. 5 ; Ch. Ca. 127 ; Ch. Rep. 129. ¶ There may be cases in which it would be necessary to make the representatives of the deceased partner, parties to the bill. *Scholefield v. Heafield*, 7 Sim. 667. See Partn. § 346, n. 1.¶

(z) *Martin v. Crump*, 1 Lord Raymond, 340 ; 1 East, 366 ; 1 Ves. ¶ *At law*, where one of two joint obligees, covenantees, or partners die, an action on the contract must be brought in the name of the survivor, the executor or administrator of the deceased cannot be joined, nor can he sue separately. And although the right of a dead partner devolves on his executor, yet the remedy survives to his companion, who alone must enforce the right by action, subject to account to the representatives of the deceased. And it follows, that where the contract is made jointly by several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who die before him cannot be joined. 2 Stephens' N. P. 1895, and cases there. And in equity, the survivor and the representatives of the deceased join as plaintiffs ; upon the principle, that parties cannot be co-plaintiffs who have, or may have, hostile interests. *Cholmondeley v. Clinton & Russ*. 116. *Grant v. Van Schoonhoven*, 9 Paige, 255.¶

(A)¶ Ante, p. 10, n. k. post, 81, n. 6.¶

(4) ‡ *Dixon v. Hamond*, 2 B. & A. 810. And see *Roberts v. O'Price*, 269, for another illustration of the same principle.‡ ¶ In the letters between the parties showed that an insurance broker, had considered himself, as dealing with one of the owners of a ship only, and as insured for him alone ; they were held to be conclusive against the broker as fixing him with an agency for his correspondent solely.

An agent cannot plead the statute of limitations to a bill filed by his principal for an account. Kent, Ch. says : " This was a plain case. The parties stood not in the relation of debtor and creditor, or of joint partners in trade, but in the relation of agent or factor, and principal. The statute of limitations does not apply to the case." *Coster v. A*

CHAPTER I.—PART II.

HAVING in the preceding part of this chapter treated of the obligations of agents towards their employers, I shall next inquire into the means of enforcing these obligations, or of obtaining redress for the neglect of them. These are—

First, Against agents personally to compel an account, or the payment of a balance, or to obtain satisfaction.

Secondly, To regain property withheld, or the produce, if improperly disposed of.

Thirdly, Against representatives in case of insolvency or death.

SECTION 1.

1. Where the transactions between the employer and agent involve mutual accounts, which must be examined before the certainty of the demand can be known, the action of account was formerly the usual remedy.^(a) And it may be found laid down in many cases, that an action of *debt or *indebitatus assumpsit* cannot [*56] properly be maintained under these circumstan-

Johns. Ch. Rep. 522, 532. *Murray v. Coester*, in error, 20 Johns. Rep. 576. But see 2 Rev. Stat. (2d ed.) p. 224, § 23, p. 229, § 52, which may seem to establish a different rule in the state of New York. And see *Bertine v. Varian*, 1 Edw. Ch. Rep. 345.¶

^(a) Eq. Ca. Ab. 5. For the proceedings in account against a factor, and the law thereon, see *Godfrey v. Saunders*, 3 Wils. 106.

ces.(1) A case is reported in which it was ruled at Nisi Prius, that an *indebitatus assumpsit* lies not against

(1) [In the case of *Scott v. M'Intosh*, 2 Campb. 238, an opinion was intimated by Lord Ellenborough, that the action of account was the proper mode of investigating a running account between a merchant and a broker, and that [*indebitatus*] *assumpsit* would not lie. This question, however, was afterwards brought under the consideration of the Court of Common Pleas, in the case of *Tomkins v. Wiltshire*, 1 Marsh. 115; 5 Taunt. 115; 18 S. C. And it was there decided, that if, upon dissecting an account, there appear money due upon certain items, *assumpsit* will lie, notwithstanding the items on each side may be numerous. And in that case Gibbs, C. observed, that "the foundation of an action of account is, that the plaintiff wants an account, and is not able to prove his items without it." See the case of *Arnold v. Webb*, 5 Taunt. 432, note.]

‡ It will be seen on reference to the report of *Scott v. M'Intosh*, that it was a case which could not be conveniently tried by a jury, and the dissent of Lord Ellenborough was probably the result of irritation at the refusal of the parties to refer. It was the same inconvenience which gave rise to the question in the two other cases, for it could never for the last hundred years have been seriously maintained that *indebitatus assumpsit* would not lie where there were items in the account capable of being established by vouchers. But the difficulty of trying complicated questions of account at Nisi Prius has been long seriously felt and acknowledged; and during the last session Lord Tenterden introduced a bill into Parliament for enabling the judge at Nisi Prius compulsory to direct a reference in such cases, which, though for the present deferred, will no doubt ultimately be carried into a law. || Mr. Justice Story, 1 Eq. Jurisp. § 442, n. (1) says; "The parliamentary commissioners, in their second report on the Common Law, (8th Dec. 1830, p. 26,) proposed to invest the courts of common law with power to refer such accounts to auditors in such cases; a suggestion which has since been adopted; as indeed it had been adopted before in some of the American States. See *Duncan v. Lyon*, 3 Johns. Ch. Rep. 361. *Massachusetts*, 20th Feb. 1818, ch. 142." As to the law of Pennsylvania see Bac. Abr. (ed. by Bouvier,) vol. 1, p. 43. By the Rev. Stat. of New York, vol. 2, (2d ed.) p. 305, § 40: "Whenever a cause shall be at issue in any court of record, and it shall appear that the trial of the same will require the examination of a long account, on either side, such court may, on the application of either party, or without such application, order the cause to be referred to three impartial and competent persons." § 41: "If the parties agree on three persons as referees, such persons shall be appointed by the court; if they disagree, each party shall be entitled to name one, and the court shall appoint the persons so nominated, if they are fit and qualified in all exceptions, and such other person as the court shall designate." The two sections are merely a repetition of provisions which had long been in force.

man where he has received money of the plaintiff to lay out to a particular use, and he has laid out part thereof accordingly ; for then, it was *said, he ought to be call- [*57] ed to account for the same by action of account ; but if none were laid out, there an *indebitatus assumpsit* lies, to recover back the money again. So if it were expended to another purpose, for there the sum is certain and may be demanded as a debt.(b) In another case, the rule laid down by the court is, “there the action of account is necessary, when the first receipt was directed to a merchandizing, which makes uncertainty of the neat remain, till account finished.”(c) And a distinction is also met with between a delivery of money, &c., upon an express promise to account, and a delivery generally : in the former of which it is said *assumpsit* lies, but in the latter account only.(d) But on misapplication of money received for a particular service,(e) or on refusal to account, the debt is absolute, and debt or *indebitatus assumpsit* lies, and after verdict, these facts will be presumed.(f) And in all cases of money received for the principal, by an agent who has no way of discharging himself but by paying it over, debt or *indebitatus assumpsit* lies, or account, at the elec- [*58] tion of the principal.(g)

isted in our statute book ; 1 Rev. Laws of 1813, p. 90 ; but the next section introduces a new provision and meets the difficulty above referred to by Mr. Lloyd, § 42 : “ When a cause shall be noticed for trial at any Circuit Court, and it shall appear that the trial of the same will require the examination of a long account on either side, the judge holding such court may, by rule, order such cause to be referred, with the like effect as if made by the Supreme Court.”

(b) *Hartup v. Wardlow*, 2 Sh. 301. And see *Poulter v. Cornwall*, 1 Salk. 9 ; *Owen*, 86.

(c) *Sparks v. Richards*, Hob. 206 ; *Anon.* 11 Mod. 92, per Holt, C. J.

(d) *Sparroway v. Rogers*, 12 Mod. 517, per Holt, C. J. And see *Wilkin v. Wilkin*, 1 Salk. 9.

(e) Per Powel, J. *Anon.* 11 Mod. 92 ; 12 Mod. 521.

(f) *Id.* *ibid.*

(g) *Kea v. Gordon*, 12 Mod. 521 ; *Hammond v. Ward*, Sty. 287.

‡ And the same remedy is available against a sub-agent although not responsible to the party really entitled principal until he has had notice of the right, and has been required to account accordingly, yet if after such notice and requisition he pay over to his own immediate principal money which has come into his hands belonging to the party who has given the notice, he will be liable to pay over again.(2)‡

2. However, special actions of *assumpsit* as for a breach of contract in not accounting upon the undertaking expressed(*h*) or implied in the contract, are sometimes brought. And this is a convenient remedy, if the matter be capable of determination without entering into the detail of mutual accounts at *Nisi Prius*.(*i*) Though there be [are] authorities which deny that such an action lies without an express promise ;(*i*) and even then, in one case, Lord C. J. Holt declared he would not let the plaintiff give all the accounts in evidence, or enter into the particulars thereof [*59] that he should direct his proof only as to the damages he had sustained by not accounting according to the promise, for he would not travel into an account of such actions.(*k*)(3)

The action cannot properly be brought in this form for money delivered for a special purpose, until there has been a failure in applying it ; for if the purpose be counted before the money is applied, the remedy is by action for money had and received.(*l*) ‡ And conversely the action for money had and received will not lie so long as the

(2) ‡ *Mann v. Forrester*, 4 Campb. 50.‡

(*h*) *Wilkins v. Wilkins*, Carth. 89 ; 1 Salk. 9, S. C.

(*i*) 12 Mod. 517 ; *Wilkins v. Wilkins*, Carth. 89 ; Comb. 149 ; Salk. 9, S. C. (But see *Topham v. Braddich*, 1 Taunt. 572.) It can be little doubt that the law will in all such cases infer a promise to account.‡ || So held by Parker, C. J. in *Clark v. Moody*, 17 Mass. post, 104, n. (*l*).||

(*k*) Carth. 89.

(3) ‡ See ante, || 56,|| note (1.)‡

(*l*) Post, || 61.||

continues open, and nothing has been done to countermand or otherwise determine it.(4)‡

3. Where the accounts are intricate and difficult, a bill in equity is the more usual and suitable proceeding to compel an account ;(m) being best calculated to do justice be-

(4) ‡ *Case v. Roberts*, Holt's N. P. C. 500 ‡ || In an action of *assumpsit* for money had and received by the plaintiffs who were creditors of an insolvent who had assigned his property to the defendants in trust for his creditors, Hoffman, J. said :—" As a general proposition, it is undoubtedly true, that a trustee is not liable to be sued by the *cestui que trust* in a court of law, from any obligations resting on him as *trustee merely*. He may, if he choose, vary his responsibilities by his own acts, and by an express agreement. If he admit that he has funds in his hands for the *cestui que trust*, and promise to pay them over to him, the law will find no difficulty in supporting the promise by a sufficient consideration. But if no promise be proved, it cannot be *implied* as an inference of law from a given state of facts. A case may exist, where the court or jury might *infer* that an express promise was made, although not proved in direct, explicit and unequivocal terms. The *necessity* of proving an express promise is one thing, and the *mode* by which it shall be done is another. From the facts shown in this case, I take it to be clear, that the remedy of the plaintiff is in chancery ; and creditors in such cases must look to that tribunal." *De Forest v. Parsons*, 2 Hall, 130, 141.¶

(m) Eq. Ca. Ab. 5. || That courts of equity have concurrent jurisdiction with courts of law, in matters of account, see *Ludlow v. Simond*, 2 Caines' Cas. in Er. 1, 38, 52 ; *Post v. Kimberley*, 9 Johns. Rep. 470 ; *Rathbone v. Warren*, 10 Johns. Rep. 595 ; *Duncan v. Lyon*, 3 Johns. Ch. Rep. 360 ; *Hawley v. Cramer*, 4 Cowen, 719, 727. Mr. J. Story, (1 Eq. Jurisp. § 442, et seq.) has pointed out the superior advantages of a bill in equity, over an action at law. Mr. Ch. Kent speaks of the action of account with some marks of favor. *Duncan v. Lyon*, 3 Johns. Ch. Rep. 361 ; and see Bac. Abr. Accompt, (Bouvier's ed. vol. 1, p. 43) ; 1 Stephen's N. P. 1. || ‡ *MacKenzie v. Johnston*, 4 Mad. 373. But the bare relation of principal and agent is not sufficient to entitle the former to relief in equity, if the matter can be fairly tried at law. *Spencer v. Spencer*, 2 Y. & J. 249. And therefore a bill filed for an account, and an injunction, must disclose a case of open and unsettled items, and not such merely as would form a ground of set-off to an action at law ; otherwise the bill will be demurrable. *Frietas v. Dios Santos*, 1 Y. & J. 575 ; *Cooper v. Hatton*, 12 Price, 502.‡ || So, Kent, Ch. says : " To sustain a bill for an account, there must be *mutual demands*, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other." *Porter v. Spencer*, 2 Johns.

tween the parties, since the plaintiff can thereby obtain discovery of books and papers, and have the benefit of the defendant's oath ; (A) who, on the other hand, [*60] is entitled to all, both legal and equitable, allowance and if, by his answer, he charge himself, the same is also a discharge, if there be no other evidence.(n) And this is also the proper mode of compelling agents to account for profits improperly or clandestinely made in breach of their trust.(o)

And in many cases where the principal has a remedy at law, as where an agent has been entrusted with money and laid out in a particular manner, the principal may either recover it on default of such application, or may obtain the specific application by the aid of a court of equity.

Ch. Rep. 169, 171. Yet a single transaction may be the subject of a bill when a discovery is requisite. 2 Story's Eq. § 464. A party may bring a bill into chancery not only to compel the defendant to account, but to have his own account allowed. *Ludlow v. Simond*, 2 Caines' Cas. in Ex. 1, 39. In general, a bill will not lie by an agent against his principal, for an account, unless some special ground is laid ; as the incapacity to get proof at law, or by discovery. *Dinwiddie v. Bailey*, 6 Ves. 136 ; post, 126, n. (C)

(A) || But in some cases, under the statute 3d and 4th Anne, ch. 11, referees and auditors are empowered to administer an oath, and examine the parties concerning the matters in question. By the Revised Statutes of New York (2d ed.) p. 306, § 50, it is provided that " When any action of account is brought by one or more partners against another partner, or by a landlord against a tenant, or tenant in common, or against any guardian, bailiff, receiver, or otherwise, and judgment shall be rendered that the parties account, or that the defendant account to the plaintiff, the cause shall be referred to referees in the same manner, and subject to the same provisions, as hereinafter prescribed in the case of a long account." And by § 51, " Such referees shall proceed in the manner required by law in other cases of reference, and shall have like powers, and subject to the same provisions in all respects. And the referees shall have power to examine the parties on oath, to be administered by the referees, or either of them ; and to require the production of all accounts, papers and documents, in the custody or under the control of either party." ||

(n) Eq. Ca. Ab. 10 ; but see *Thompson v. Lambe*, 7 Ves. 588, for an exception to this rule.

(o) 4 Ves. Jun. 411, 13 id. 47 ante.

(p) *Scott v. Surman*, Willes, 404. || 1 Story's Eq. § 463—464.

4. Wherever the demand does not depend upon a settlement of open accounts, *(q)* as where the accounts are closed and a balance agreed, *(r)* an action of debt or *assumpsit* for money had and received, or on an account stated, or if against a *del credere* agent, an action of *assumpsit* upon the special undertaking is the proper remedy. And a balance struck with a promise to pay it, has been held sufficient to maintain an *assumpsit*, notwithstanding a covenant to account. *(s)*

*5. Likewise if an agent receive money, either [*61] from his employer for a special purpose, or from a third person to pay over to his employer, and neglect or refuse so to apply it, it may be recovered by the same form of action. *(t)* "It is," according to Lord Chief Justice Willes, "a general rule, that if a man receive money which ought to be paid to another, or to apply to a particular purpose, to which he does not apply it, the action of *assumpsit* will lie as for money had and received; and

(q) Hob. 306; 2 Sh. 308.

(r) *Egles v. Vale*, Cro. Jac. 69; Yelv. 70.

(s) *Foster v. Alanson*, 2 T. R. 479; ¶ *Danforth v. The President &c. of the Schoharie Turnpike Co.* 12 Johns. Rep. 227, 230; sed vide, *Gibson v. Stewart*, 7 Watts (Pa.) Rep. 100; Post, 69.¶

(t) *Lincoln v. Topliff*, Cro. Eliz. 644. ¶ An action for money received by an agent on account of his principal lies without a previous demand and refusal, unless it may be in the case of a foreign factor, or an attorney at law, employed for the collection of debts. *Lillie v. Hoyt*, 5 Hill, 395. In an action by a merchant residing in New York, against the defendants, merchants at Martinique, for the proceeds of goods sold by the latter; the Supreme Court of New York, in giving judgment of nonsuit said: "Before there had been any default or *laches* shown on the part of the defendants, and after repeated offers on their part to pay or remit according to order, the plaintiff commenced his suit. The defendants, in the character of consignees or factors, were bound to pursue the directions of their principal, and after apprising him of the sale, to wait for those directions. Until a default on their part, they were not liable to an action; and to support the action in the present case, would be against the policy and usage of trade, as well as against justice and good faith. If we were so to deal with factors, we should soon put an end to the practice of employing them." *Ferris v. Paris*, 10 Johns. Rep. 285.¶

though a bill in equity may be proper in several of the cases, yet an action at law will lie likewise. As if I pay money to another to lay out in the purchase of a particular estate, or any other thing, I may either file a bill against him, considering him as a trustee, and praying that he may lay out the money in that specific thing,^(A) or I may bring an action against him as for so much money he has received for my use.⁽⁵⁾ Courts of equity always sustain such bills when they are brought under a notion of trust, and therefore have often given relief where the party might have had his remedy at law, if he had thought proper to proceed that way."^(u)

This is also a proper form of action where money has been deposited for a particular purpose, whether that purpose be legal or illegal, if it have been countermanded before application.^(v)

6. Under any of these circumstances, therefore, the claim is proveable under a commission of bankruptcy, and is not barred by certificate.^(w)

7. The debt to be recovered by any of the means stated, is the balance only of sums received after deducting all just allowances, though not pleaded by way of set-off,^(x) together with interest, if any have been made.^(y)

(A) || Must there not be some further equity than what is presented in the supposed case, in order to give jurisdiction to courts of equity? Story has cited the passage in the text, (1 Story's Eq. § 463,) and in the next section, (464,) he insinuates a doubt as to the correctness of the opinion of C. J. Willes; which, however, seems to have been a mere *obiter dictum*. But, certainly, as the learned commentator says; the above doctrine, "is a little too broadly stated."||

(5) † But see *Case v. Roberts*, ante † || 59.||

(u) *Scott v. Surman*, Willes, 404.

(v) *Taylor v. Lendie*, 9 East, 49. || This action, it seems will lie against an agent for money which he has raised by an unauthorized disposition of the goods of the principal, who may waive the tort and affirm the act of the agent; as where the latter has wrongfully pledged his principal's goods. *Bonzi v. Stewart*, 4 Mann. & Gran. 295, post, 213, n. d.||

(w) *Wright v. Hunter*, 1 East, 20; 2 Ves. 792.

(x) *Dale v. Sollett*, 4 Burr. 2135.

(y) *Rogers v. Boehm*, 2 Esp. Cas. 704. || Ante, 49 ||

8. If money have been actually paid to an agent for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands. For though the law would not have assisted the principal, by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet when that contract is at an end, the agent, whose liability arises solely from the fact of having received money for another's use, can have no pretence to retain it.(A) This doctrine was recognized by the Court of Common Pleas in a case where a broker, having effected an insurance upon a ship engaged in a trade to the East Indies, contrary to the *7 Geo. I. st. 1, [*63] c. 21, s. 2, and having received the loss from the underwriters, refused to pay it over to his employer, alleging the illegality of the transaction as a defence to the action for money had and received to his use. The plaintiff, however, had a verdict; and the court, upon a motion for a new trial, thought the verdict right.(z) And in a subsequent case, where the defendants had received money for the plaintiff, as the price of counterfeit coin, which they had been employed to carry and procure payment for from the parties who purchased it, it was held, that the illegality of the transaction furnished no defence to them in an action for money had and received. And, in both these cases, the court considered the original transaction as forming no part of that implied contract arising from the receipt of the money, which formed the ground of the action.(a)

(A) || If acting merely as the agent of the person on whose account he receives the money, the case falls within the general rule that an agent cannot dispute his principal's title. Ante, p. 10, n. (k.)||

(z) *Tenant v. Elliott*, 1 B. & P. 3.

(a) *Farmer v. Russell*, 7 Ves. 473; 1 B. & P. 296. || The opinion of Chief Justice Marshall in the following case affords a clear and satisfactory illustration of the subject.—Toler brought an action of *assumpsit* against Armstrong to recover a sum of money paid by Toler, on account of goods,

the property of Armstrong and others, consigned to Toler, which had been seized and libelled in the District Court of Maine in the year 1814, as having been imported contrary to law. The goods were shipped during the war with Great Britain, at St. Johns in the province of New Brunswick for Armstrong, and other citizens and residents of the United States, consigned to Toler, also a domiciled citizen of the United States. The goods were delivered to the agent of the claimants on stipulation to answer, in the event of the suit, Toler becoming liable for the appraised value; Armstrong's part of the goods was afterwards delivered to him, on his promise to pay Toler his proportion of any sum for which Toler might be liable, should the goods be condemned. The goods having been condemned, Toler paid their appraised value, and brought this action to recover from Armstrong his proportion of the amount. At the trial the defence resisted the demand on the ground of its illegality; but the jury in pursuance of the direction of the court, found a verdict for Toler. (See *Toler v. Armstrong*, 4 Wash. C. C. Rep. 297.) A bill of exceptions was taken on the charge of the judge; and judgment having been rendered for the plaintiff, a writ of error was brought to the Supreme Court of the United States, which affirmed the judgment of the court below.

Marshall, C. J., in delivering the opinion of the Supreme Court said: "The main object of the charge [of the judge in the court below] was to state to the jury the law of contracts, on an illegal consideration, so that it was supposed to bear on the case before them. To enable them to apply the law to the facts the court [below] supposed many cases, in which a contract would be void, the consideration being illegal.

"After having stated the law to be, that where the contract grows out of an illegal act, a court of justice will not enforce it, the court [below] proceeds to say, 'but if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the illegality of the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. If A. should, during war, contrive a plan for importing goods from the country of the enemy, on his own account, by means of smuggling or collusive capture, and goods should be sent in the same vessel for which A. should upon the request of B., become surety for the payment of duties, or should undertake to become answerable for the expense of a prosecution for illegal importations, or should advance money to B. to enable him to pay those expenses; these acts constituting no part of the original scheme, here would be a new contract upon a valid and independent consideration, unconnected with the original act, although remotely connected with it, and such contract would not be so contaminated by the turpitude of the original act, as to turn A. out of court when seeking to enforce it, although the illegal introduction of the goods into the country was the consequence of the scheme projected by A. in relation to his own goods.' In this opinion be contrary to law, the judgment ought to be reversed."

"The opinion is, that a new contract, founded on a new con-

although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. This general proposition is illustrated by particular examples, and will be best understood by considering the examples themselves. The case supposed is, that A. during a war, contrives a plan for importing goods on his own account from the country of the enemy, and that goods are sent to B. by the same vessel. A., at the request of B., becomes surety for the payment of the duties which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money? The opinion is, that such an action may be sustained. The case does not suppose A. to be concerned, or in any manner instrumental in promoting the illegal importation of B., but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B. afterwards adopted. This illustration explains what was meant by the general words previously used, which, unexplained, would have been exceptionable.

“The contract made with the government for the payment of duties is a substantive independent contract, entirely distinct from the unlawful importation. The consideration is not infected with the vice of the importation. If the amount of duties be paid by A. for B., it is the payment of a debt due in good faith from B. to the government; and if it may not constitute the consideration of a promise to repay it, the reason must be, that two persons who are separately engaged in an unlawful trade, can make no contract with each other; at any rate, no contract which in any manner, respects the goods unlawfully imported by either of them. This would be, to connect distinct and independent transactions with each other; and to infuse into one which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage.

“The same principle, diversified in form, is illustrated by another example. If A. should become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B. to enable him to pay those expenses, these acts, the court [below] thought would constitute a new contract, the consideration of which would be sufficient to maintain an action.

“It cannot be questioned that, however strongly the law may denounce the crime of importing goods from the enemy in time of war, the act of defending a prosecution instituted in consequence of such illegal importation is perfectly lawful. Money advanced then by a friend in such a case, is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration.

“It is laid down with great clearness, [in the opinion of the court below,] that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him with his privity, that he might protect and defend them

for the owner, a bond or promise given to repay any advances, made pursuant to such understanding or agreement would be utterly void.

“ The questions whether the plaintiff had any interest in the goods of defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in importation.

“ Questions upon illegal contracts have arisen very often, both in England and in this country ; and no principle is better settled, than that an action can be maintained on a contract, the consideration of which is not wicked in itself, or prohibited by law. How far this principle is to be applied to subsequent or collateral contracts, the direct or immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, upon which many controversies have arisen, and many decisions have been made.

“ In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it, as to be inseparable from it. As, where a factor in a foreign country packs up goods for the purpose of enabling the vendee to smuggle them ; or where a suit is brought on a policy of insurance on an illegal voyage ; or on a contract which amounts to a loan ; or on one for the sale of a lottery ticket, where such sale is prohibited ; or on a bill which is payable in notes prohibited by law ; and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegality of the transaction.” *Armstrong v. Toler*, 11 Wheat. 258. Although this decision did not occur in a case between principal and agent, yet it is thought proper to give some copious extracts, considering its intimate connection with the main topic presented by the author in his text ; and the connection which Mr. Justice Story (Agency, § 347,) admits by the contract he has himself made. The above decision, (of which his knowledge was probably solely derived from Story on Agency,) is criticised by Lord Russell, in his treatise on the law of factors and brokers (p. 183, 184) with some force, impugns its correctness. But see the case of *Parsons v. Angell*, 2 Crompton, Meeson & Roscoe's Rep. 211, to which he refers, p. 179 ; and Lord Abinger's opinion in that case, extracted in 10 N. P. 273. And see post, 102, 116, et seq. *Wetherell v. Jones*, 10 N. P. & Ad. 221. *McFadden v. Jenkins*, 1 Hare, 462. *Hodgson v. Bland*, 1 Taunt. 181 ; 2 Kent's Comm. 466. *Greenwood v. Curtis*, 6 N. P. 380, 381.||

The same rule has also been laid down in courts of equity.(b) And there is no difference in this *re- [*64] spect between a transaction that is *malum prohibi- tum*, and one that is *malum in se*.(c)

(b) 7 Ves. 473. Post, 66.

The authority of these cases may seem to be opposed by one, which, though of older date, does not appear to have been adverted to in the consideration of them. The plaintiff was an underwriter, and the defendant a broker. The plaintiff had paid a loss upon a ship-policy underwritten by him; but another person, who had agreed to take half the plaintiff's risk, had paid his moiety of the loss into the defendant's hands, from whom the plaintiff sought to recover it as money received for his use; but Lord Kenyon was of opinion, that this was an illegal partnership, and that the plaintiff could not recover, considering the action as brought to enforce an illegal contract. It does not, however, appear, that the question in that case was taken up on any other grounds than as a question of the plaintiff's right to recover against the other partner. It is consistent, therefore, with the circumstances stated in the report, that the broker had received notice to retain it, which, it is admitted in the cases referred to, would have prevented the plaintiff's recovery. *Sullivan v. Greaves*, Park. Ins. 8; 6 T. R. 409. † This case is not considered to be law.†

(c) *Farmer v. Russell*, 1 B. & P. 296, per Eyre, C.J.; *Aubert v. Maize*, 2 B. & P. 371; † *Cannan v. Bryce*, 3 B. & A. 179; *Bensley v. Bignold*, 5 B. & A. 335; *Ex parte Daniel*, 14 Ves. 192. ‖ *Perkins v. Savage*, 15 Wend. 412.‖ The absurd distinction between *mala prohibita* and *mala in se* was certainly considered to have been exploded by the good sense of the Courts and the authorities above referred to. It is, therefore, matter of regret that the Court of King's Bench seems, in a recent case, to have again admitted the distinction in favor of the right of a plaintiff to recover. *Brown v. Duncan*, 10 B. & C. 93; Lloyd & Welsby's Merc. Cas. 91; and see the note to the latter report.† ‖ The case of *Brown v. Duncan*, 10 Barn. & Cress. 93, appears proper to be stated more at length from the connection which it bears to the principle decided in the case, which will be next referred to. It was an action of *assumpsit* on a guaranty, and after a verdict for the plaintiffs, with liberty for the defendant to move to enter a nonsuit, the rule was refused. Lord Tenterden, before whom the cause was tried, delivered the judgment of the court. He says: "This action was brought by five plaintiffs against the defendant, on a guaranty which he had given to them for the payment (by a person named in that guaranty) of the price of whiskey which should be consigned by the plaintiffs to that person for sale by him as their agent. By the act of the 6 G. IV. c. 81, s. 7, which regulates the business of distillers, every person who is a distiller ought to be named in the license; and by another act of the 4 G. IV. c. 94, ss. 131,

132, no person who is a retailer of or vendor of spirits within the distance of two miles from the place of the distillery can or ought to be licensed a distiller. One of the five plaintiffs was not named in the license, and that one carried on the business of a retailer of spirits within the limited distance. It was, therefore, contended that the trade having been carried by him in violation of the excise regulations (with the knowledge of his partners) the plaintiffs could not recover for the spirits which they had sold and consequently could not recover against the present defendant, who was the guarantee for their agent. But we think that the plaintiffs are entitled to recover. There has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations which it has been thought wise to adopt, in order to secure (as far as may be) the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue. The cases of *Hodgson v. Temple*, 5 Taunt. and *Johnson v. Hudson*, 11 East, 181, are in favor of the plaintiffs' right to recover. In the first of those cases a distiller had sold spirits to a rectifier who was also a retailer, with the knowledge that his vendee filled casks with spirits, and had delivered the spirits, not in the place at which the retail trade was carried on, but at the place in which he carried on the business of a rectifier, and to which they were delivered, not in the defendant's name, but in the name of another person. That was certainly a strong case, because there, as it was contended, that was clearly and knowingly to a certain degree violating the law. The court of Common Pleas, however, thought the plaintiffs were entitled to recover. In *Johnson v. Hudson*, the action was brought to recover the price of tobacco and spirits which they had been imported into this country from Guernsey; they were sold by the plaintiffs to Hudson, and the plaintiffs had no license as dealers in tobacco, wherefore it was contended that they could not recover. The court, doubting indeed whether the plaintiffs from this single instance could be considered as dealers, held it not to be such an illegality as to deprive the owner of the goods, who had sold them to another, of his right to recover the price. These cases are very different from those where the provisions of acts of parliament have had for their object the protection of the public, such as the acts against stock-jobbing and the acts against usury. Different also from the case where a sale of bricks, required by act of parliament to be of a certain size, was held to be void because they were under that size. There the act of parliament operated as a protection to the public, as the revenue, securing to them bricks of the particular dimensions required. The clauses of the act of parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods. In the authority of the two cases which I have mentioned, we think the plaintiffs are entitled to retain their verdict."

The following decision pursues the same analogy.—It was an *assumpsit* on a policy of insurance, on a voyage from Mansinell island of Cuba, to Boston, and the defence was that the vessel was

worthy, inasmuch as all her water was placed *on deck*, and none secured *under deck*. A verdict having been rendered for the plaintiff subject to the opinion of the court *in banco*, judgment was given according to the verdict. Wilde, J. in delivering the opinion of the court, after stating the provisions of the act of congress in relation to the quantity and stowage of water on board of ships says: "The defendant's counsel contend that the non-compliance with this requisition of the statute rendered the voyage illegal, and consequently that the policy is void. They rely on the general principle, that a contract founded on an illegal consideration, or which is made for the purpose of farthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void as against the policy of the law. This general principle is well established, but like all general rules, it is not without exceptions; and the present case, we think, falls within one of the exceptions to the general rule. The rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy; but where a contract is founded on a transaction which is prohibited for the benefit of a particular individual or individuals, and has no influence on the public welfare, such contract is not absolutely void, but only voidable by the party for whose benefit the prohibition is introduced. So, where an act is enjoined, under a penalty and a contract is remotely and incidentally connected with the omission to do and perform the act enjoined, the contract is not necessarily void." After referring to several cases the judge proceeds: "Upon the authority of those cases, and upon principle, we think it very clear, in the present case that the voyage was not illegal by reason of the non-compliance with the statute, nor the vessel unseaworthy on this account. The statute was made for the benefit of the crew; and was afterwards extended to passengers. Both statutes are merely directory, and amount to no more than this, that the master and owner shall be liable to a penalty, if the crew and passengers shall be put on short allowance, provided the vessel shall not have been supplied with water &c. in compliance with the direction of the statute." *Warren v. The Manufacturers' Ins. Co.* 13 Pick. 518. These two cases seem to point at a distinction between the omission to do an act required by law, and the doing of an act forbidden by law.

But the *malum prohibitum* by which a contract may be invalidated, must be governed by the *lex loci contractus*, and if the contract be valid in the place where made or in which it is to be performed, it will be valid here, not *ex proprio vigore*, but only *ex comitate*. *Blanchard v. Russell*, 13 Mass. Rep. 6; *Le Roy v. Crowninshield*, 2 Mason, 161; *The Commonwealth of Kentucky v. Bassford*, 6 Hill, 526; Story's Conf. of Laws, § 29, et seq. In the following case comity seems to have been carried to the extreme. A bill was filed by the plaintiff as representative of G. W. T. deceased, praying that a memorandum of debt which had been given by the deceased to the defendant, might be delivered up to be cancelled, and that the defendant might be restrained from proceeding with an action which he had commenced against the plaintiff for the recovery of the sum mentioned in that

memorandum ; and alleging *inter alia* that it was wholly or in great part made up of sums which the defendant had either won from T. at cards, or lent to him for the purpose of gaming while they were upon a tour together upon the continent. The defendant in his answer, stated that as to part of the consideration, about £25, it had been won by him from T. at different times in the course of the tour, at cards, but in sums of less than £10 at a sitting ; and that another part, but to what amount he could not tell was due for moneys lent by him to T. at the public tables at Baden Baden, and other places in Germany, and had been employed by T. in gaming at such public tables. An injunction was granted by the vice chancellor of England which was dissolved by Lord Lyndhurst, who observes : “ Another part of the debt consisted, as stated in the answer ‘ of money lent to the testator when he was playing at the public tables at Baden Baden, and other places in Germany, which money was employed by him in gaming at such public tables.’ What ground is there for saying that this cannot be recovered? First, it does not appear what the games were, or that they would have been illegal even in England : and until the late case of *McKinnel v. Robinson*, (3 Mee. & Wels. 434,) in the Court of Exchequer, it had always been supposed, and there are several decisions to that effect, that though securities given for money lent to play at certain games were void by the statute of Anne, yet that the money itself might be recovered. But in the case to which I have referred of *McKinnel v. Robinson*, it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action. But this rule does not apply to the present case. For there is nothing to show that the public gaming tables where the money was lent were not lawful in the countries where they were held ; on the contrary the presumption is, that, as they were public, they were lawful ; and if we might import our private knowledge into a case of this nature, (upon which, however, I do not mean to rely,) it is notorious that they are in several places in Germany sanctioned by the government, which receives a rent from the persons by whom they are kept. The Lord Chief Baron of the Exchequer in giving judgment in the case of *McKinnel v. Robinson*, observes as to *Robinson v. Bland*, (2 Burr. 1077,)—in which it was held that money lent to play with might be recovered—that the money was not lent to play at an illegal game, gaming not being unlawful in France, where the loan was made. It does not appear, therefore, to me, that there is anything to prevent the defendant from recovering in respect of this part of the debt, in his action at law.—As the memorandum therefore, affords *prima facie* evidence of the debt, and as there is nothing to show that any part of it is founded upon an illegal consideration, I see no reason why this court should interfere, or why the defendant should not be allowed to prosecute his action.” *Quarrier v. Colston*, 1 Phillips, 147. But notwithstanding the general principle that the validity of a contract depends on the law of the place where made, yet it

But if the demand of the principal cannot be brought before the Court, but through the medium of the illegal contract itself, he cannot enforce it.^(A) Thus where money had been deposited with a stock-broker to lay out in

is a necessary exception to the universality of the rule, that no people are bound or ought to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law. 2 Kent's Comm. 458; Story's Conf. of Laws, p. 203-215; *Lodge v. Phelps*, 1 Johns. Cas. 139; *Van Reimsdyk v. Kane*, 1 Galison, 371; *Bank of Augusta v. Earle*, 13 Peters, 589; *Harvey v. Richards*, 1 Mason, 413, 414, 430; *Le Roy v. Crowninshield*, 2 Mason, 157; *Greenwood v. Curtis*, 6 Mass. Rep. 378, 379; *Blanchard v. Russell*, 13 Mass. Rep. 6; *Frazier v. Willcox*, 4 Robinson's (La.) Rep. 517; *The Commonwealth of Kentucky v. Bassford*, 6 Hill, 529. In the absence of proof of the foreign law, our own law will be assumed as the rule of decision. *Bentinck v. Willink*, 2 Hare, 1.

"Where a provision is enacted for public purposes, I think that it makes no difference whether the thing be prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done, and the objection must prevail not for the sake of the defendant, but for that of the public." Bailey J. in *Bensley v. Bignold*, 5 Barn. & Ald. 335. In the same case, Holroyd J. says; "There does not appear to me to be any sound distinction between those cases, where a statute requires a thing to be done, and where it prohibits it from being done." And Best J. observes; "The distinction between *mala prohibita*, and *mala in se*, has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interest of the state." In *De Begnis v. Armistead*, 10 Bingh. 107; Tindal, C. J. says; "The principle by which the present case is to be decided, is very clearly expressed by Holt, C. J., in *Bartlett v. Viner*, Carth. 252—'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.' The same principle is more briefly expressed by Lord Ellenborough in the case of *Langton v. Hughes*, 1 M. & S. 596—'What is done in contravention of the provisions of an act of parliament, cannot be made the subject of an action.' " A contract declared by statute to be illegal, is not made good by a subsequent repeal of the statute. *Jaques v. Withes*, 1 H. Black. 65.||

(A) || *Armstrong v. Toler*, ante 63, n. a.||

illegal stock-jobbing adventures, and upon a settlement of accounts, the broker gave bills for a sum, part of which was for the profits of these transactions, the Lord Chancellor, upon a review of all the cases upon the subject, would not allow the principal to prove under the broker's [*65] commission for that part of the "amount of his debt which was made up of those profits.(d) And in an action for money had and received for the plaintiff's use, the facts were, that the plaintiff had employed the defendant as his agent, to buy certain shares in the British ale brewery, for which the defendant had charged and received from the plaintiff at the rate of 10 per cent *premium*, whereas the market price was 5 per cent, and the action was brought for the surplus. But the British Ale Company appearing to be an illegal undertaking under 6 Geo. I. c. 18, s. 18, 19, (by which also the purchase of shares in such undertaking is made an offence,) the plaintiff was nonsuited, upon the ground that no action could arise from a transaction in itself illegal.(e)

If the agent have not actually received the money, but have debited himself with the amount in his account with the party, who is to pay it to his employer, that will not enable the latter to support an action for it, as money received to his use.(f)(6)

(d) *Ex parte Bulmer*, 13 Ves. 313.

(e) *Buck v. Buck*, 1 Campb. 547, cor. Sir J. Mansfield, C. J. of C. P.

(f) *Edgar v. Fowler*, 3 East, 222.

(6) † The proposition in the text is not warranted by the judgment of the court in *Edgar v. Fowler*, unless it is to be understood as applying solely to an illegal transaction. The words of Lord Ellenborough are these: "the money does not appear to have been actually *paid* into the defendant's hands. *In cases of illegal transactions it may always be stopped whilst it is in transitu to the person who is entitled to receive it.* If indeed this had been a legal transaction, the money might, perhaps, have been considered as paid." That in ordinary cases, an agent who has taken credit in account is estopped to say, as against his principal, that he has not received the money, is expressly decided in the case of *Andrew v. Robinson*, *supra*, p. 40.†

*9. As long as money deposited with an agent, [*66] for an illegal purpose, remains unemployed, or if the purpose be countermanded by the principal before application, it is a debt which may be recovered at law(g) or in equity.(h)

(h) 13 Ves. 313.

(g) *Taylor v. Lendie*, 9 East, 49. || But if part of the money has been expended by the agent in effecting the illegal object, an action will not lie to recover back the unexpended balance. Thus: in an action of *assumpsit* the plaintiff at the trial proved a receipt for \$500, given by the defendant, by the terms of which the plaintiff insisted the defendant was bound to account to him for that sum, and so the circuit judge ruled. The defendant then offered to prove that the \$500 specified in the receipt was the balance received by him from the plaintiff, for the purpose of enabling him to subscribe for stock of the *Utica and Schenectady Rail Road Company*, on the opening of books for subscriptions to the stock of the company; which subscriptions were to be made in the name of the defendant, and in the name of such other persons as he *should procure to subscribe*, but for the benefit of the plaintiff, to whom the stock which should be apportioned by the commissioners to the defendant and to such persons as he should procure to subscribe, should be transferred immediately after such apportionment; and that in pursuance of such agreement, various subscriptions were *made and procured to be made* by the defendant, and that the stock apportioned upon such subscriptions, had been transferred to the plaintiff, leaving the \$500 specified in the receipt *unaccounted for by the plaintiff to the defendant*. The counsel for the plaintiff objected to the introduction of such evidence, and the judge rejected it, deciding that it was inadmissible; and that the evidence would not show a transaction *prohibited by law*, or a transaction so far illegal or improper as to preclude the plaintiff from recovering back the money advanced to the defendant. A verdict was rendered for the plaintiff for \$500 with interest. But the court, notwithstanding its dishonesty, sustained the defence, and granted a new trial. Nelson, J. delivering the opinion of the court, said; "By the act incorporating the *Utica and Schenectady Rail Road Company*, the sum of *five dollars* on each share of the stock subscribed for, was required to be paid at the time of making the subscription; and in case of a subscription to more than the amount of the stock authorized to be created, it was the duty of the *commissioners* named in the statute to *apportion* the stock among the subscribers in such manner as should be deemed most advantageous to the interests of the corporation. The question presented in the case is, whether the contract offered to be proved by the defendant, and which was rejected by the circuit judge on the trial, was made in violation of any of the provisions, or of the spirit and policy of the statute incorporating the *Utica and Schenectady Rail Road*

And it was once held, that even where money, deposited for an unlawful object, had been applied by the agent towards that object, the principal might, nevertheless, make him answerable for it.⁽ⁱ⁾ But the contrary appears since to have been taken for granted by Lord Mansfield. For in an action tried by him at Guildhall, to recover back from the defendant a sum paid to him for the purpose of being given to a creditor, to sign a bankrupt's certificate, and it appearing that the money had actually been so paid over, his lordship was clearly of opinion, that the action would not lie against the party's own agent, who had actually ap-

Company. If it was so made, I am of opinion the plaintiff cannot recover. The money sought to be recovered was advanced to the defendant, in pursuance of the contract, and it is by virtue of its terms, either express or implied by law, that the action must be sustained, if it can be at all. This is not an attempt by the plaintiff to avail himself of a *locus penitentie*, to retrace his steps, and disaffirm an unlawful agreement while it is yet executory; the illegal purpose or act has been executed, and the effect of a recovery is to enable him to realize a part of the fruits of it, by enforcing a performance by the defendant. The defendant was bound to invest the whole of the money in stock; or if he failed in this, the balance was to be refunded, and a transfer of the stock procured, made to the plaintiff. The obligation to do both arises out of the contract, and it is in vain to distinguish between this action, and one to recover the value of the stock, if there had been a refusal to transfer it. If, under the express or implied obligation to refund the balance of money unexpended, the plaintiff can sustain the action, it is impossible, I think, to contend against a compulsory transfer of the stock upon the same principle. In each case the validity of the contract is recognized, and its provisions enforced. It is supposed, however, by the counsel for the plaintiff, that if the contract is conceded to be illegal, as against the policy of the act of incorporation, still the only consequence is to avoid it; and that the money placed in the hands of the defendant, in pursuance thereof, may be recovered back." The learned judge proceeds to review the authorities and reasoning on this point, and concludes; "the cases abundantly show the contract under consideration to be illegal, whether considered of a positive provision of the statute, or of the spirit and policy of it. Indeed, this principle is broadly stated in many of the cases already referred to for the purpose of showing [that] the action could not be sustained if the contract was illegal, both parties being *in pari delicto*." *Perkins v. Savage*, 15 Wend. 412.||

(i) *Wilkinson v. Kitchen*, 1 Lord Raym. 89.

plied the money to the purpose for which it was paid to him. (k)(7)

(k) *Smith v. Bromley*, Doug. 696, in *notis*. In the case of *Tomkins v. Barnet*, 1 Salk. 22, it is said the following case was cited:—One was employed as a solicitor, and had money given him to bribe the custom-house officers, and he laid out the money accordingly; *assumpsit* was brought against the solicitor for the money, and held, it lay not. Though the case of *Tomkins v. Barnet*, is treated by Lord Mansfield in *Smith v. Bromley*, as of no authority, yet he recognizes the case here mentioned as law.

(7) ‡ The law is somewhat different as regards a mere stakeholder. For it has been settled by many cases, that where money has been deposited in the hands of a third person, to abide the event of some illegal transaction, either of the parties may at any time insist on taking back his portion of the stakes; and though the event have been determined, and the stakeholder have paid the money over to the winner, still if the loser, even after the decision, but before the payment over, had expressed his dissent, the stakeholder will be bound to pay him his moiety of the stakes. *Hastelow v. Jackson*, 8 B. & C. 222, where all the cases on this subject are reviewed. ¶ *Hastelow v. Jackson*, was decided by the Court of King's Bench, in Easter term, 1828. In that case the plaintiff and W. deposited in the hands of the defendant, a stakeholder each £20 to abide the event of a boxing match between them: a dispute arising as to who was the winner, it was referred, and the umpire decided in favor of W. The plaintiff then claimed the whole amount of the stake from the defendant, and gave him notice that if he paid it over to W. he should bring an action to recover it. The defendant, however, afterwards acting upon the decision of the umpire, paid over the money. At the trial, the plaintiff claimed only his own deposit of £20, for which he had a verdict, and the court refused a new trial. Mr. Justice Bayley, who gives the leading opinion in the case, after alluding to authorities on the subject observes: "That there is a material difference between actions by one party to an illegal contract against the other, and those against a stakeholder. If money has been paid upon such a contract by one party to the other, he cannot recover it unless he rescinds the contract while it remains executory. That it may, as between the parties, be rescinded before the event happens, has been established by a variety of cases. It has been urged that a decision for the plaintiff in the present case would go beyond all former cases, for that the money had been paid over before the action was brought, and the plaintiff had done no act to rescind the wager, nor had ever intimated that he claimed his own money, and that only. But if a stakeholder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril. In *Howson v. Hancock*, (8 Term Rep. 575,) the jury found that the money was left with the assent and concurrence of the plaintiff; the de-

cision, therefore, amounted simply to this, that where money has been paid over with the assent of the party, he cannot get it back. Here, it is true, the whole was demanded ; the defendant said he should pay it to the other party ; the plaintiff desired him not to do so, and threatened him with an action. That was a plain expression of dissent ; the defendant, therefore, paid over the money at his own peril, and having paid over what could not have been recovered from him, he paid it in his own wrong. W. could not have recovered more than his own money, without proving himself the winner, and that could only be established by proving that he had done an illegal act. He therefore could not have recovered the money, deposited by the plaintiff ; and the defendant having paid over the whole after the plaintiff's prohibition, which was valid as to a moiety of the stakes, paid over that moiety wrongfully, and is liable to refund it to the present plaintiff."

In a case decided fourteen years before (January 1814) by the Supreme Court of New York, the same principle was adopted and enforced in an equally luminous and convincing manner. It was the case of a wager, between qualified voters, upon the result of an approaching election, and of course illegal. The material facts were as follows : The plaintiff deposited with one Alexander, as his agent, 500 dollars, to bet on the approaching election of Governor of the state of New York. Alexander, as such agent, made a bet with P. S. P. and deposited the money with the defendant, who afterwards was notified by the agent that the money belonged to the plaintiff. The election having been decided adversely to the plaintiff, he demanded his \$500 from the defendant, who admitted that he had the money in his possession, but refused to deliver it to the plaintiff. A verdict was found for the plaintiff for that sum with interest, subject to the opinion of the court on a case with liberty to turn it into a special verdict. Judgment was rendered for the plaintiff, and Kent, C. J. in delivering the opinion of the court, says : " Much is said, in some of the cases, upon the distinction between executed and executory contracts, and that when the plaintiff waits, without taking any step to rescind the contract, until the risk has been run, the court will not help him to recover back the deposit money, but will remain neutral between the parties. The claim of the plaintiff is repelled by the maxim that *in pari delicto potior est conditio possidentis*. But this objection is applied exclusively to the suit against the principal or winner ; and there is no instance in which it has been used as a protection to the intermediate stakeholder, who, though an agent in the transaction, is no party in interest to the illegal contract. As between the plaintiff and him, the maxim has no application. He is not *in pari delicto*, and the parties must be *equally* criminal before the maxim can be applied. The stakeholder cannot in good conscience appropriate the money to his own use ; and as it was received without a valid consideration, and for an illegal purpose, the plaintiff, as against him, has the preferable title ; the action is founded on the *disaffirmance* of the unlawful contract, and on the ground that it is void, and that the money ought not to pass to the winner. After the event, it is then, indeed, too late for the loser to reclaim the money

from the winner, for then the maxim applies ; but before the event has happened, either party may repent, and recall the deposit money, even out of the hands of his opponent. And if the money is still with the stakeholder, the happening of the event is immaterial, and either party may, at any time, arrest it. These are the true distinctions, and which go to reconcile all the cases. There is not a case, or a *dictum*, as I apprehend, that does not allow the merits of the contract to be discussed, so long as the defendant stands in the character of a stakeholder. There are cases in which the payment of money to an agent, on the consummation of an illegal contract, to and for the use of the opposite party, has been held recoverable without looking back to the original contract ; but in those cases the money was not deposited with the agent, *qua* stakeholder, to abide the event. It was paid absolutely for the principal's use. But where it is a mere *deposit* on the contingency of the *bet*, the winner cannot claim it by suit, as that would be an *affirmance* of the illegal contract, and asking the aid of the court to enforce it. In *Edgar v. Fowler*, (3 East, 222,) some losses had actually happened upon the illegal policies, before the assured gave notice to the broker not to pay over the premium, and yet the assignees of the underwriters were not allowed to recover that premium out of the hands of the broker, though the risk in that case had actually been run. The English rule is the true rule on this subject. On the disaffirmance of the illegal and void contract, and before it has been carried into effect, and while the money remains in the hands of the stakeholder, each party ought to be allowed to withdraw his own deposit. The court will then be dealing equitably with the case. It will be answering the policy of the law, and putting a stop to the contract before it is perfected." *Vischer v. Yates*, 11 Johns. Rep. 23. There were four other suits, by other persons who had delivered different sums at the same time to Alexander, for the purpose of betting on the same election, and which depending on the same facts and principles as the above case were decided by the court on the same ground, and judgments entered for the plaintiffs accordingly. In all these cases writs of error were brought, and the judgments of the Supreme Court reversed by the Court of Errors. In the report of the proceedings before the Court of Errors, only the opinion of one senator is published, which is remarkable merely for sophistical reasoning, and puerile declamation. *Yates v. Foot*, 12 Johns. Rep. 1. And see what is said by Spencer, J. in reference to that case, in *Deniston v. Cook*, 12 Johns. Rep. 377, 378. In Pennsylvania it has been held that money bet upon the event of an election, and deposited with a stakeholder, may be recovered back, if demand be made before the money is paid over to the winner, though after the result of the election is known. *Mc Alister v. Hoffman*, 16 Serg. & Rawle, 147. In New York, the Revised Statutes, in very comprehensive terms, declare all wagers void. 1 Rev. Stat. (2d ed.) p. 666, § 8. The English judges have sometimes, at *Nisi Prius*, refused to try actions on wagers. *Egerton v. Purzeman*, 1 Carr. & Payne, 613, and cases cited in note, *ibid* ; *Kennedy v. Gad*, 3 Carr. & Payne, 376 ; 3 Stephens N. P. 2740. And see *Edgell v. Mc Laughlin*, 6 Wharton's (Pa.) Rep. 176.||

[*67] *10. Where there is a covenant, or bond conditioned to account, assumpsit does not lie^(l) before an account taken or a balance agreed to,^(m) but the remedy is upon the deed.

The duty required from a factor, or agent, may be contracted by the covenant to a narrower compass than that which the employment itself would prescribe;⁽⁸⁾ for though a factor, generally speaking, cannot trade with his principal's goods on his own account, yet, in an action on a bond conditioned, 1st, to perform all covenants in a certain indenture, one of which was to serve the obligees as factor at Fort St. George; 2d, to *account,
 [*68] upon request, with the East India Company, for whatever of their goods should come to his hands, *or the nett produce of them*; and the breach assigned was, that he unlawfully embezzled and took certain specified articles to his own use: it was held, that this was no breach of the condition; the reason given for which was, that the defendant, being to account not for the goods themselves, but for the nett produce, might convert to his own use the stock, provided he answered it out of his own.⁽ⁿ⁾

In assigning a breach of a condition of this kind, care must be taken to bring it within the terms *recited* in the condition, though the obligatory part thereof may be general.^(A) Thus, the condition of a bond recited, that the defendant was receiver at Bristol to the plaintiffs: "if, therefore, he do well and truly account for all sums by him received, then the bond to be void." The breach assigned

(l) *Bulstrode v. Gilburn*, 2 Str. 1027.

(m) *Foster v. Alanson*, 2 T. R. 479. || Ante, 60.||

(8) † *Conventio vincit legem*.†

(n) *Shepherd v. Maidstone*, 10 Mod. 144. || See the explanation suggested by the author, ante, p. 51, as to this case. It certainly requires explanation.||

(A) || In every bond, the obligatory part, or penalty, is general. "It is a sound and settled rule, that the penalty of a bond cannot be made to cover any other debt or demand than that specified in the condition." Kent, Ch. *Troup v. Wood*, 4 Johns. Ch. Rep. 247, post, p. 70, n (r.)||

was, that he received so much, and did not account for it; and because it appeared by the recital to be only about transactions of a particular nature, the general assignment of the breach was held ill.^(o) So, likewise, if it recite an intended service for a particular time, though the condition be general, the obligor will not be liable on the *covenant* beyond that *time,^(p) though he will still [*69] be liable for money had and received.^(A)

If the account involve a multiplicity of items, which could not be detailed in pleading, without inconvenient prolixity,^(B) it is not necessary, in an action upon a bond for a breach of the condition to account, to enumerate each sum of money received; but to a plea of general performance it is sufficient to reply, that the defendant has received so much, for which he has not accounted.^(q)

Though the condition be only to render an account, a

(o) *African Co. v. Mason*, 1 Str. 227. See 1 Saund. 411; 6 East, 509.

(p) *Liverpool W. W. Co. v. Atkinson*, 6 East, 509.

(A) || In *Ingleby v. Swift*, 10 Bing. 84, it was held, that a bond taken in the penal sum of £1000, could not be reduced to £500 by a recital in the condition that the parties had agreed to execute a bond in the sum of £500. Alderson, J. observes; "No doubt, general expressions in the condition of a bond may be restrained by particular recitals, but the court cannot reduce the penalty by the recital of an agreement to execute a bond in another penalty, which bond does not appear to have been executed." ||

(B) || *Postmaster General of United States v. Cochran*, 2 Johns. Rep. 416. *Hughes v. Smith*, 5 Johns. Rep. 173. *Calvert v. Gordon*, 7 Barn. & Cress. 809. ||

(q) *Shum v. Farrington*, 1 B. & P. 643; *Barton v. Webb*, 8 T. R. 459, contra, *Jones v. Williams*, Doug. 214; 10 Mod. 144; but see S. C. 1 Str. 227.

‡ In *Gale v. Reed*, 8 East, 85, Lord Ellenborough expressly stated, that the case of *Jones v. Williams*, was overruled. The principle is, that where the particulars lie more in the knowledge of the defendant than of the plaintiff, a general averment is sufficient. See also *Wilcock v. Nicholls*, 1 Price, 109, and *Calvert v. Gordon*, 7 B. & C. 807. || *Postmaster General of United States v. Cochran*, 2 Johns. Rep. 413. || It appears, however, from the case of *Serra v. Wright*, 6 Taunt. 45, that the Court of Common Pleas considered a breach ill assigned which stated merely that the defendant had not accounted, without averring that he had received moneys, although the breach was in the terms of the covenant.‡

breach that the obligee neglected to pay what was found due, is well assigned.(c)

If the condition be to pay over the balance at a place to be appointed, and the defence is, that no place has been appointed; the defendant must plead that fact specially in the first instance, for, *if pleaded by way of rejoinder, after a plea of payment and replication, alleging non-payment at the place appointed, it is a departure.(r)

(c) || *Back v. Proctor*, Doug. 367. ||

(r) *Sams v. Dangerfield*, 2 Mod. 31.

It is usual for bankers and others, who are obliged to entrust the receipt of money to agents or clerks, to provide for their indemnity, by the bond of a third person, conditioned for the fidelity of the agent. Upon the subject of these securities, it may be useful to notice the following points: 1. However general the condition, it is restrained, both as to duration and object by the recital. Bond with condition, reciting that whereas H. A. had appointed T. J. to execute the office of deputy postmaster for the county of ... from the 24th of June, for six months following, to be void if the said T. should well and faithfully perform the duties, &c. *during all the time* should continue deputy postmaster. It was held, notwithstanding the generality of the words *during all the time*, that the surety was not liable longer than the time specified in the recital. *Lord Arlington v. Merrick* Saund. 411; *Liverpool W. W. Company v. Atkinson*, 6 East, 509, S. *African Company v. Mason*, 1 Str. 227. || *Ingleby v. Swift*, ante, note. ||

[*Pearsall v. Somerset*, 4 Taunt. 593. So the obligation is restrained both as to duration and object, if it appear on the pleadings that the pointment is only for a limited time. *Saint Saviour's, Southwark*, v. ... *teck*, 2 N. R. 175; *Hassell v. Long*, 2 Maule & Selw. 363. † Or appear by *Act of Parliament* that the office is annual, or otherwise limited because then it is unnecessary to state it on the record. *Peppin v. Co* 2 B. & Ald. 431.† But where the Act of Parliament, by which the office was created, did not expressly limit its duration, and the obligation was definite in its language, relating to a period both prospective and retrospective, the surety was held liable during the whole time that the officer continued in office. *Curling v. Chalklin*, 3 Maule & Selw. 502.]

† See also *Leadley v. Evans*, 2 Bingh. 32, where the decision is somewhat at variance with this last case, though founded on the same general principles, and *Saunders v. Taylor*, 9 B. & C. 35. || Although the obligation be limited in its duration, if it clearly appears from the condition, that the parties meant to provide for the continuance of the party in office, a

the responsibility of the surety upon a re-appointment of the same individual, the obligation of the surety will, notwithstanding the obligees are themselves annual officers, if given to them and their *successors*, continue in force, after the obligees to whom the bond is given, have gone out of office. *McGahey v. Alston*, 1 Mee. & W. 386. *Angero v. Keen*, id. 390. || A bond conditioned for the fidelity of a clerk, was put in suit against the *executor* of the obligor. The breaches were after the death of the testator, and after a notice given by the executor that he would no longer be liable. But the court held, that the executor could not *at once* get rid of his liability by a notice, and that if hardship resulted from the obligation, the parties should take care to express in the condition of the bond, that the liability should be at an end in a specified time after due notice given. *Calvert v. Gordon*, Dan. & Lloyd's Merc. Cases, 173. || S. C. 7 Barn. & Cress. 809. || An injunction which had been previously obtained by the executor to restrain an action on the bond was dissolved on the merits. 2 Sim. 253 ; and see 4 Russ. 581. || 583, n. 1, American ed. ; 1 Story's Eq. Jurisp. § 326, note ||

2. Where the obligation is, that the agent shall account for and pay to the obligee, his executors, &c. the surety is not liable for neglect of accounting in the employment of the executors, though the same business be continued by them, and the agent remain in the same employment. *Barker v. Parker*, 1 T. R. 287.

3. If the business, to which the employment relates, be carried on by the obligee or obligees alone, at the date of the bond, the obligation ceases upon the introduction of another partner. *Wright v. Russell*, 2 Bl. Rep. 934 ; 3 Wils. 530 ; and the principal of these cases has been recognized in *Strange v. Lee*, 3 East, 490. But where the condition recited, that the plaintiffs intended to take P. S. into *their* service as a clerk in their shop and counting house, it was held, that the surety was not discharged by the introduction of a new partner ; the court particularly resting upon this being a security to the house, and not to the individuals. *Barclay v. Lucas*, 1 T. R. 291 ; || S. C. 3 Doug. 321. || In the case, however, of *Strange v. Lee*, 3 East, 490, Lord Ellenborough intimated a doubt of the soundness of this decision, and observed, that expressions occur there which it is difficult to reconcile with the other authorities. And it may be remarked, that the case of *Wright v. Russell*, to which Mr. J. Willes there denies his assent, has been acted upon since, viz. in *Myres v. Edge*, 7 T. R. 255. It is suggested by Mr. J. Lawrence, 3 East, 491, that the condition might be taken to be answerable not only to the present, but to all future partners. It seems, that the same effect follows from the secession of one of the former partners, as from the introduction of a new one. *Myres v. Edge*, 7 T. R. 255. || Theobald (Law of Principal and Surety, p. 76) says, speaking of the cases of *Wright v. Russell* and *Barclay v. Lucas*, " the two cases have been considered *antinomous*." And in the next page, the same writer observes :—" It should be observed, that the reasoning of the court in this case, [viz. *Barclay v. Lucas*,] divides itself into two main arguments ; one

derived from the consideration of the peculiar terms of the condition or engagement under adjudication ; the other general, and seemingly applicable to all surety bonds given to bankers. But from the subsequent cases I think it appears, that the first argument alone is valid ; and consequently the only corollary of the decision, considered as extant law, is, that a surety bond may be so drawn as to continue in favor of the obligees after a change in their firm or partnership ; but that for it so to continue it must distinctly appear by its terms that such was the intention of the parties." The authorities on this point are collected by the editor of the supplemental volumes of Douglass' Reports, who arrives at the conclusion just stated. Doug. 321, note.¶

[So, a bond conditioned to re-pay to five persons all sums advanced them, or any of them, in their capacity of bankers, was held not to extend to sums advanced, after the decease of one of the five, by the four survivors then acting as bankers. *Weston v. Barton*, 4 Taunt. 673. And where a bond was given to the governors of a voluntary society, conditioned to secure from their collector a faithful account of all moneys received by him, and the society was afterwards incorporated, the obligors in the bond were considered not liable for moneys collected after the incorporation, and misapplied by the collector, on the ground, that after the change of incorporation the society constituted a perfectly new body of persons in the judgment of the law. *Dance v. Girdler*, 1 N. R. 34. On the other hand, where a bond was given to certain persons, as trustees, on the behalf of a successive or fluctuating body of persons, the obligation was held to remain in force, notwithstanding a change in the company, the court construing it as an indemnity to the company for the time being. *Mellor v. Bruin*, 12 East, 400.] † And see *Leadley v. Evans*, and *Saunders v. Taylor*, *supra* ; *Pearse v. Hirst*, 10 B. & C. 122 ; *Lloyd & Welsby's Case*, 81. A suretyship for a particular individual does not extend to a partnership formed by the obligee with that individual as one of a partnership subsequently formed. *Bellairs v. Ebsworth*, 3 Campb. 52. And conversely, a suretyship for a firm is at an end on the death or retirement of any of the partners of that firm. *Simson v. Cooke*, 1 Bing. 452.†

4. A condition to account is a condition to pay what shall be found due. Condition that A. should render a true account in writing ; the breach assigned was, that upon the last account in writing £—— was due from A. which, upon demand, he refused to pay ; and, upon demurrer, the breach was held well assigned. *Bach v. Procter*, Doug. 367.

5. Such a guarantee is not waived by the obligee not having given immediate notice to the surety of the agent's misconduct ; nor even by the agent's credit for the sums embezzled, as for a loan. *Peel v. Tatnell*, 4 B. & P. 419. [*Nares v. Rowles*, 14 East, 510 ; *The Trent Navigation Company v. Harley*, 10 East, 34 ;] † *Lincoln Assurance Company v. Goring*, 4 B. Moore, 153 ; *Goring v. Edmond*, 3 M. & P. 259.† ¶ 1 Bing. 94. In that case, Tindal, C. J. says : " I am far from saying that this may not be an extreme case of laches amounting to fraud, and fraud

be a defence to the action ; but not mere negligence." And Gaselee, J. adds, " I think a surety has a duty upon him to go and inquire as to the state of the transaction." And see *Eyre v. Everitt*, 2 Russ. 381, 384, note 1, Am. ed. ; *Orme v. Young*, Holt's N. P. Rep. 84 ; 1 Story's Eq. Jurisp. § 325, 326.||

But where the obligee, on becoming surety for the fidelity of an apprentice, took a covenant from the master that he should, at least once a month, see the apprentice make up his cash, it was held by the Lord Chancellor, on a bill filed by the obligor for relief against an action on the bond, that the covenant was not only to see to the right casting of the cash, but to see it effectually made up ; and that the obligor was liable for no more than the apprentice had embezzled in the first month. *Montague v. Tidcombe*, 2 Vern. 518 ; 1 Eq. Ca. Ab. 308.

6. If the condition be to repay whatever the agent shall purloin and embezzle to his employer's damage, a breach that he purloined and embezzled so much is good, without averring it to be to the damage of the employer ; for the words " purloin and embezzle " are always taken in a bad sense, and *ex vi termini* import the damage of the master. *Thornicroft v. Barnes*, 10 Mod. 149. || In an action on a bond given for the due performance of the office of cashier of a bank, Story, J., delivering the opinion of the court, says :—" The condition that Minor shall ' well and truly execute the duties of cashier ' of the bank is said to be merely a stipulation for honesty, in the discharge of the duties, and not for skill, capacity or diligence. We are of a different opinion. ' Well and truly to execute the duties of the office,' includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully—if they are violated from want of capacity or want of care, they can never be said to be ' well and truly executed.' The operations of a bank require diligence with fitness and capacity, as well as honesty, in its cashier ; and the security for the faithful discharge of his duties, would be utterly illusory, if we were to narrow down its import, to a guarantee against personal fraud only." *Minor v. The Mechanics' Bank of Alexandria*, 1 Peters, 46, 69. So, it was held that a bond faithfully to perform the duties of teller of a bank binds the obligors to a responsibility for reasonable and competent skill and due and ordinary diligence in the performance of his office ; that what was reasonable and competent skill, and due and ordinary diligence, depends upon the nature of the office ; that the obligors were bound, not for the honesty only of the teller, but for a faithful execution of the duties of his office which embraces competent skill and due diligence ; and, that taking into consideration the known nature and duties of the teller of a bank, the allegation that he had received moneys for which he had not accounted, was a sufficient assignment of a breach of the bond, which, if not justified or excused, would amount to a forfeiture. *The President, &c. of the North American Bank v. Adams*, 12 Pick. 303. As to the liability of the sureties for a teller of a bank, for over payment of a check, see *The President, &c. of the Union Bank v. Clossey*, 10 Johns. Rep. 271, where the court says :

[*71]

*SECTION 2.

1. For misconduct, neglect, or disobedience of instructions by an agent, the remedy is, either by
 [*72] *action on the case as for a wrong, or of assumpsit on the implied undertaking. In one or other
 [*73] *of these actions, the principal may recover compensation in damages for the injury suffered.(1) To
 [*74] support these actions it is necessary to prove, *1st. Actual damage ;(2) 2d. Negligence or default in the

“ A mere mistake in over payment of a check can never be alleged as a breach of trust, for the mistake may happen to a teller of the purest morals, and the best capacity for business.” S. C. 11 Johns. Rep. 182; and see *Mechanics' and Traders' Bank of New Orleans v. Monserrat*, 5 Robinson's (La.) Rep. 187; *Anderson v. Thornton*, 3 Ad. & Ellis, N. S. 271; *Chapman v. Bukinton*, id. 703.||

(1) † A bill of discovery will lie in aid of an action by the principal against his agent for misconduct; and a London broker cannot protect himself from answering such bill on the ground that such discovery will subject him to a forfeiture of the penalty of his bond to the corporation of London. *Green v. Weaver*, 1 Sim. 404.†

(2) † Proof of actual damage is not essential to the maintaining of the action. Not to the action of *assumpsit*, because if there be a contract, and that contract has been broken by the agent, he is at once liable to an action, although the damages will be merely nominal, if no injury has been sustained in fact. Not to the action on the case as for a wrong, because wherever there is a right on one side and a duty on the other, founded on a sufficient consideration, the law implies a contract between the parties, and therefore the action on the case for such a breach of duty is always convertible into an action of *assumpsit* founded on the implied contract, wherein the defaulter is, as we have said, always liable for his default, though no damage be shown to have resulted. An endeavor, indeed, has recently been made to introduce a distinction in this respect between an *express* and an *implied* contract. In the former, it was admitted that actual damage was not essential to the action; but it was contended that the latter, which was a creation of the law, would not arise unless some injury had resulted from the breach of it. The court, however, very properly rejected this distinction, alleging that the only difference between an express and an implied engagement was, that the former was established by direct proof—the latter was inferred from circumstances; and that when once the

agent. As to the first, the loss of a *supposed or [*75] probable advantage is not sufficient ;(A) and, there-

contract was established, in whatever manner, the same consequences must attach. *Marzetti v. Williams and others*, 1 B. & Ad. 415. || See *Boorman v. Brown*, 3 Ad. & Ellis, N. S. 511, 526.|| This case is further important as illustrating the general liability of one species of mercantile agent, that, namely, of a banker to his customer, and it may be well, therefore, to give an abstract of it here. The plaintiff was a merchant in the city of London. The defendants were bankers also in London, with whom the plaintiff kept an account. On the evening of the 17th Dec. 1828, the balance in favor of the plaintiff was 69*l.* 19*s.* 6*d.* About eleven the following morning a further sum of 40*l.* was paid in to his account. About three o'clock in the afternoon of that same day a check, drawn by the plaintiff for 87*l.* 7*s.* 6*d.*, was presented for payment, which the clerk to whom it was presented, after referring to the books, refused to pay, alleging that there was not sufficient assets. On the following day it was paid. The plaintiff thereupon brought an action on the case against the defendants, and in his declaration, after setting forth that he was a merchant, &c. and that the defendants were bankers, he alleged a custom of trade in London that bankers, having cash balances of their customers in their hands, and not being under any engagements or liabilities for such customers, should honor and pay the checks of the customers duly drawn for any part of such balances immediately on presentment. Then followed averments that on, &c. he was such customer, and had a cash balance in the hands of the defendants as bankers, and that they were under no liabilities for him—that he drew a check for a part of the balance, which was presented to the defendants and refused by them, contrary to their duty as bankers, &c. There was no averment of special damage, and none was proved at the trial. Parke, J., before whom the cause was tried, was of opinion, that a banker, who received a sum of money belonging to his customer, became his debtor the moment he received it, and was bound to pay a check drawn by such customer, after the lapse of such a reasonable time as would afford an opportunity to the different persons in the establishment of knowing the fact of the receipt of such money, and that the refusal to pay a check, under such circumstances, was a breach of duty for which an action would lie, and he directed the jury to find for the plaintiff, if they were of opinion that such a reasonable time had intervened between the receipt of the money at eleven o'clock and the presentment of the check at three. The jury found a verdict for the plaintiff, with 1*s.* damages, and on motion afterwards made to enter a nonsuit, the Court of King's Bench was of opinion that the action was maintainable, and the direction right.

(A) || Where a factor was directed to purchase and ship certain articles on account of his principal ; but, in disobedience of his orders, he purchased and shipped articles of a different description ; it was held that the value at

fore, in an action against an agent for not procuring an insurance, it is a sufficient defence that the insurance, if made, could not have been enforced by law ; nor is [*76] it any answer to that *defence, that by usage and courtesy such insurances are generally paid.(s) Secondly, the damage must appear to have been brought about by the default of the agent. It has been seen that he is not liable for any event produced by following his instructions, or pursuing the ordinary modes of transacting business ;(t) but is chargeable with the consequence of ignorance,(u) or the neglect of any precaution prescribed by the accustomed course of business, though not expressly included in his instructions.(v) For the payment of money is a sort of insurance for the due performance of the service undertaken.(w)

2. Since the obligation of an agent is not founded solely upon the commission or reward paid for his labor, but partly upon the reliance induced by his acceptance of the charge, it follows that a gratuitous agent is not exempt from responsibility.(x) But there is a material difference between the circumstances necessary to sustain an action against an agent of this description, and against one who is retained for a commission. For first, in an action [*77] for mere *non-feasance, it is necessary to state a valuable consideration for the undertaking, and therefore (where there is no public duty) no action lies for the bare neglect of a voluntary service.(y)

the place of destination of the articles directed to be purchased afforded a reasonable standard for the estimate of damages. *Bell v. Cunningham*, 3 Peters, 69, 85 ; and see *Smith v. Condry*, 1 How. 28, 35.¶

(s) 7 T. R. 157 ; *Park. Inst.* 303. Ante, ¶ 8, 20.¶

(t) *Russell v. Hankey*, 6 T. R. 12 ; *Ex parte Parsons*, Ambl. 219. ¶ Ante, 9, 45.¶

(u) 2 Wils. 325.

(v) 3 Ves. 565 ; 6 Id. 229 ; 1 Bro. C. C. 452.

(w) *Shiells v. Blackburne*, 1 H. Bl. 159, per Wilson, J.

(x) *Wilkinson v. Coverdale*, 1 Esp. Cas. 75 ; ante, p. 19, and note (6.)

(y) *Elsee v. Gatward*, 5 T. R. 143 ; 1 Esp. Cas. 74 ; *Coggs v. Bernard*, 2 Lord Raym. 909 ; ¶ ante, 19, n. (6.)¶

In the next place, though an action lie for misfeasance in the actual performance of the undertaking, yet in this respect also the responsibility of a voluntary agent is inferior in degree. For whereas a hired agent is bound to possess such a degree of skill as would in general be adequate to the service, a gratuitous agent is not bound to possess such skill, but is only chargeable by proof of gross negligence,^(x) or † if he be acting in a public or professional character, † of having omitted to use that skill, which, from his situation, office, or profession, he † ought and † cannot but be supposed to have.^(A) For though not bound to possess knowledge, nor liable for error occasioned by the want of it, yet he may justly be required to exert that which he has, or which from his station, office, or profession, he must be presumed to have, and the neglect to do so may be considered as gross negligence.^(B) A merchant undertook, without any compensation, to enter at the custom-house a parcel of leather, of a particular kind, which being seized, together with a parcel of his own, by reason of the erroneous *entry it was held that he was not answer- [*78] able for the loss, having acted *bonâ fide*, and to the best of his knowledge. Upon that occasion it was said by Lord Loughborough, that if a man be in a situation or profession to imply skill, an omission of that skill is imputable to him as gross negligence. If, for instance, in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry in them would have been gross negligence, because their situation and employment, necessarily imply a competent degree of knowledge in making such entries.^(a)

(x) 2 Atk. 406 ; 2 Lord. Raym. 909.

(A) || *Wilson v. Brett*, 11 Mees. & Wels. 113.||

(B) || It seems, that, as far as any general rule can be laid down on the subject under discussion, negligence is not a matter of law, but of fact, for the jury. *Doorman v. Jenkins*, 2 Ad. & Ellis, 256.||

(a) *Shiells v. Blackburne*, 1 H. Bl. 151. † And see *Bourne v. Diggles*, 2 Chitty's Rep. 311 ; *Dartnall v. Howard*, 4 B. & C. 345. † || Mr. Chan-

SECTION 3.

The remedies hitherto spoken of are such as respect the agent personally in regard to the charge and duty annexed to his character ; the following respect the recovery of the specific property in his hands, or the specific produce thereof, and particularly in the event of bankruptcy or death.

cellor Kent, after noticing and stating the case of *Shiells v. Blackburne*, proceeds, as follows : “ So, if a surgeon should undertake, *gratis*, to attend a wounded person, and should treat him improperly, he would be liable for improper treatment, because his profession implied skill in surgery. If, however, the business to be transacted presupposes the exercise of a particular kind of knowledge, and a person accepts the office of mandatary, totally ignorant of the subject, then it has been said, that he cannot excuse himself on the ground, that he discharged his trust with fidelity and care. A lawyer, who would undertake to perform the duties of physician ; a physician who would become an agent to carry on a suit at law ; a bricklayer, who would propose to repair a ship, or a landsman to navigate a vessel, are cited as examples to illustrate the distinction. But if the agent has the qualifications necessary for the discharge of the ordinary duties of the trust imposed, it is sufficient to exempt him from responsibility for errors into which a man of ordinary prudence might have fallen.” 2 Kent’s Comm. 582.

In *Chapman v. Walton*, 10 Bing. 57, which was an action against a policy broker for the want of proper care and skill, Tindal, C. J. said : “ The point to be determined is,—whether upon the occasion in question, he [the defendant] did or did not exercise a reasonable and proper care, skill and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not, have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it ; and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant.” If an agent to sell lands, sell them below their fair value, in consequence of selling them at improper times, or of the neglect to make proper inquiries as to the value of the land sold, it is proper to charge him with the true value. *Quackenbush v. Leonard*, 9 Paige, 347.]]

1. The right of property remaining in the principal, notwithstanding the possession of the agent, entitles him to maintain an action of trover against the latter for goods, &c., wrongfully and unwarrantably disposed of by him.(b) But as this *action requires not only right [*79] of possession of the property claimed in the plaintiff, but also some wrongful act done by the defendant towards it, either in the first taking or the subsequent disposal ; and as the first taking is not, in the case of an agent, unlawful, it is necessary, in order to support this action, that there should be some act proved, amounting to a wrongful disposition of the property.(A) This must be either by proof of a disposition contrary to authority, or by that which is evidence of it, a demand and refusal while the property is in the power of the defendant.(b) The action, therefore, does not lie for a mere non-delivery ;(b) nor is it a conversion, if an agent employed to sell goods, not having an opportunity of doing so, deliver them to his own agent for that purpose.(c) And if goods be sold with the consent of the principal, no subsequent refusal to account for the produce will support this action ;(d) nor a demand and refusal after the property is out of his possession, for then it is no evidence of a conversion.(1)

*But a disposal(e) or delivery contrary to express [*80]

(b) *Anon.* 12 Mod. 602. Post, § 80, 81.||

(A) § *Packard v. Getman*, 6 Cowen, 757.||

(b) *Severin v. Keppel*, 4 Esp. 157 ; *Weymouth v. Boyer*, 1 Ves. Jun. 424 : and see 6 East, 540, per Lord Ellenborough.

(c) *Bromley v. Coxwell*, 2 B. & P. 408. § Ante, 17, n. (h).|| (But see *Cockrun v. Irlam*, 2 Maule & Selw. 301.)

(d) 1 Ves. Jun. 424.

(1) † *Smith v. Young*, 1 Campb. 441 ; *McCombie v. Davies*, 6 East, 538 ; 9 East, 5. If the agent in his answer admit a wrongful delivery of them to another person, that, of course, will be proof of a conversion.‡ || Refusal upon a ground false or deceptive is equivalent to a general refusal. *Hobrook v. Wight*, 24 Wend. 178.||

(e) *Powell v. Sadler*, Sitt. after Easter Term, 1806, B. R. West. Trover for three horses. Plaintiff had sent the horses to defendant to be sold the

directions, (f) is such a conversion as will sustain the action, unless made to one who has a right to the possession, which it lies upon the defendant to make out. (A)

next day; defendant's clerk told him the next day would not be so good a time to sell them as the following *sale day*; in consequence of which the plaintiff said he would send for them back again, which he did the next evening, but they had been sold. In a conversation concerning the sale, the defendant said, "It was a mistake of his clerk, for which he was not answerable." Garrow, for the defendant, insisted that there was no evidence of a conversion. Lord Ellenborough, C. J. "I am of opinion that a conversion has been proved; the horses were entrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; 'as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion.' " See also *Youl v. Harbottle*, Peake, N. P. 49; 4 T. R. 264. Delivery by a carrier to a wrong person, held, by Lord Kenyon, to be a conversion. (2)

(f) *Syeds v. Hay*, 4 T. R. 260; Peake, N. P. 49.

(A) || So, if an agent sign a receipt acknowledging to hold the property for a third person, this is itself a conversion. *Holbrook v. Wight*, 24 Wend. 169. But where possession of the goods was fraudulently obtained by the plaintiff who delivered them to an auctioneer to sell, and the auctioneer refused to pay the proceeds to the plaintiff, it was held that the fraud was a defence. *Hardman v. Willcock*, 9 Bing. 378, note. Such a defence may frequently be very convenient for an agent wishing to retain the proceeds of a sale, which he may employ in his own speculations, and make more than mere simple interest. The assignees of the insolvent, in *Hardman v. Willcock*, gave notice to the auctioneer of their claim, and after the sale, gave him an indemnity against the not paying over the proceeds to the plaintiff, who was his principal. He might then, very honestly, have retained the money, as against his immediate principal; but whether he could do so legally, unless restrained by injunction, is a distinct question; as it is also, whether he could file a bill of interpleader, and thus in the words of Lord Brougham, (cited, ante, p. 10, n. k,) "treat his principal to a chancery suit." The case can hardly be deemed an authority except for one running *quatuor pedibus* with it. The liability of an agent, in an action of trover, is clearly and succinctly summed up, by Mr. Justice Bronson, in the following terms: "The most usual remedies of a principal against his agent, are the action of *assumpsit*, and a *special action on the case*, but there can be no doubt that trover will sometimes be an appropriate remedy. That

(2) [But if a broker, being authorized to sell goods for a certain price, sell them at an inferior price, he is not liable in trover for the amount of the goods, the proper remedy being by an action on the case. *Dufresne v. Hutchinson*, 3 Taunt. 117.]

A refusal to deliver property by an agent to his principal, from a *bona fide* apprehension of the consequence of adverse claims, may, as to certain circumstances, be entitled to protection ;(g) but no case appears to have decided that *such a defence can be made at law to [*81] an action of trover.(5) It was held, however, upon the following facts, that an agent, against whom a verdict in trover had passed, was entitled to relief in equity. The action was for a subscription receipt in S. S. || South Sea|| stock, deposited with the defendant as agent, and delivered by him, through mistake, to another person. The relief was granted, upon evidence that all the receipts, though numbered, were considered as of equal value, and that the plaintiff's receipt was put by the defendant, as usual, into a drawer with several others of the same description, belonging to others, for one of which it had been mistakingly delivered.(h) (6)

action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use ; and the fact of conversion may be made out, by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some act on the part of the agent—a mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this action for a conversion of the goods can be maintained." *McMorris v. Simpson*, 21 Wend. 610, 614. and see *Cairnes v. Bleeker*, 12 Johns. Rep. 300.||

(g) Post, || 151.||

(5) † On the contrary, it has been expressly decided that an adverse claim made by another constitutes no defence to this action, unless that claim be well founded in law. *Wilson v. Anderton*, 1 B. & Ad. 450.† || Ante, p. 10, n. (k.)||

(h) *Turner v. Crookshank*, Ambl. 187.

(6) † Up to a recent period the usual mode by which an agent, or rather a middle-man obtained relief in the case of contending claims, was by filing a bill of interpleader in a court of equity. But now by 1 & 2 Will. IV. c.

[*82]

*SECTION 4.

1. By 5 Geo. II. c. 30, s. 39, factors, brokers, and bankers, were made subject to the bankrupt laws; † and the provision is continued in the new Bankrupt Act, 6 Geo. IV. c. 16, s. 2; † it becomes, therefore, a matter of inquiry, what effect their bankruptcy has upon the rights of their principals, in the specific property entrusted to their charge.

The statute 21 Jac. I. c. 19, s. 10, 11, declared, that if any person, shall become bankrupt, and at such time shall, by the consent and permission of the true owner, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon themselves the sale, alteration, or disposition, as owners, such goods shall be liable to the bankrupt's debts.(1) The case, however, of a factor having property of his principal in his possession, though not expressly excepted, [*83] has always been *considered as an exception to this rule :(a) for, according to Lord Mansfield, the act

58, relief may be obtained on motion in a court of common law. It must be remembered, however, that an agent, in the strict sense of that term, cannot dispute the title of his principal. Ante, p. 53; and see *Stonard v. Dunkin*, 2 Campb. 244; and *Hawes v. Watson*, 2 B. & C. 542. † Ante, p. 10, n. (k.)||

(1) † The 72d section of the new bankrupt act, which is in substance a re-enactment of the above section, is in these words: "If any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission," exceptions being made as to ships mortgaged and duly registered. †

(a) The first case in which this appears to have been decided is that of *L'Apostre v. Plaistrier*, 1708, 1 P. Wms. 318; 1 Atk. 175; before Holt, C. J. and afterwards made a case in K. B. The same point is recognized in *Godfrey v. Furzo*, 1733, 3 P. Wms. 185; and in *Ex parte Dumas*, 1 Atk. 234; 2 Ves. 585. The first of these cases, however, which the others

does not extend to every possible case, where one man has another's goods in his possession ;(A) it does not extend to the case of factors who have other men's goods as trustees, or under a bare authority to sell ; but the goods must be such as the party suffers the trader to sell as his own.(b)

seem to have been guided by, is said to have been decided upon the principle, that the enacting part of the statute is restrained by the preamble, and applies only to property originally the bankrupt's. (1 Ves. 243.) A doctrine expressly recognized by C. B. Parker, and Lord Hardwicke, in *Ryal v. Rolls*, 1 Atk. 175, 182, and 1 Ves. 371, though it had been treated as a ridiculous notion by Lord Ch. Cowper, *Copeman v. Gallant*, 1 P. Wms. 319. Since this opinion, therefore, has been overthrown, and it is now established by the case of *Mace v. Cadell*, Cowp. 232, that the act includes property not originally the bankrupt's, the older authorities may be thought to be weakened ; but the propriety of the decision in *L'Apostre v. Plaistrier*, as to the principal point, has never been questioned, and the authorities cited in the text establish the same principle, though for a different reason. (See *Taylor v. Plumer*, 3 Maul. & Selw. 576.)

(A) ¶ “ Property held in trust, is not the property of the bankrupt ; it does not pass to his assignees.” Lord Lyndhurst, *Gardner v. Rowe*, 5 Russ. 262. It is a principle, and a principle which the author, or his subsequent editors are perhaps in fault for not introducing in some apt place, or connection, that in equity. assignees in bankruptcy take the bankrupt estate subject to all liens and equities, to which it was obnoxious while in the hands of the bankrupt himself. “ I have always understood,” says Sir William Grant, M. R. “ that the assignment from the commissioners, like any other assignment by operation of law passed his rights precisely in the same plight and condition as he possessed them. Even when a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to.” *Mitford v. Mitford*, 9 Ves. 100. So, Mr. Justice Story remarks, “ that it is a perfectly well settled principle in equity, that the assignee in bankruptcy takes the property and rights of the bankrupt in the same plight and condition, and with all the equities attached thereto, in the same manner as the bankrupt himself held them. I recollect at present but one exception to the doctrine and that is in the case of fraud.” *Fletcher v. Morey*, 2 Story's Rep. 555, 564. “ This principle, that the assignees of a bankrupt are not considered as purchasers for valuable consideration, in the proper sense of the word, has been long established.” Lord Plunket ; *Lyster v. Burroughs*, 1 Dru. & Walsh, 176. See *Winsor v. M'Lellan*, 2 Story's Rep. 493, 495, 498 ; *Mitchell v. Winslow*, id 630, 637 ; *Muir v. Schenck*, 3 Hill, 231 ; *Leslie v. Guthrie*, 1 Bing. N. C. 550 ; *Ex parte Simpson*, 1 Deacon, 47.¶

(b) *Mace v. Cadell*, Cowp. 233 : *Ryall v. Rolls*, 1 Atk. 172.

And it is said, by Lord Kenyon, that the case of a factor has been so frequently decided, and so much taken [*84] for granted for a series of years past, that "it must now be considered as at rest.(c) The reason assigned for this exception is, that as factors and bankers must, by the course of trade, have the goods of other people in their possession, it does not therefore hold out a false credit to the world ;(d) nor carry to the understanding of the world the reputed ownership.(e) It may, however, perhaps, notwithstanding this general principle, be a question of fact,(f) whether such a false credit might not, under certain circumstances, be acquired by the possession of a factor, as would bring the case within the act.(2)

(c) *Tooke v. Hollingworth*, 5 T. R. 226 ; *Bryson v. Wylie*, 1 B. & P. 82.

(d) Per Buller, J. 1 B. & P. 83.

(e) Per Le Blanc, J. *Horn v. Baker*, 9 East, 245.

(f) Lord Ch. Cowper considering the false credit as the object of the act, though he admitted the general exception in favor of factors, yet stated, "that if a factor continue a long possession, by which the goods are taken as his own, and credit given to him on that account, it would alter the case ; for, if possession and disposition be given to a person who becomes a bankrupt, though no intent of fraud appears, yet if it give a false credit, there is the same inconvenience as if fraud were intended ; and it matters not whether it was by fraud, or only by neglect, or out of a humor." 7 Vin. Ab. 89, cited in marg. as *Copeman v. Gallant*, MS. Rep. Trin. 1716. Note, however, this does not appear in the report of that case. 1 P. Wms. 314.

(2) † A man may be an agent to sell for an unknown principal, and have possession of the goods for the purpose of sale, and yet he may not be, in the strict mercantile sense of that term, a *factor*. And whether in such case the exception in favor of the real owner will apply, may be a question. The following is a case of this kind :—An eminent banker, by a secret agreement, took from a timber dealer a transfer of a large bargain, which the latter had made for timber to be fallen. By the same agreement he constituted the timber-dealer his agent to dispose of the timber, and to receive and account for the proceeds. The banker paid the price, amounting to 10,000*l.* and the timber was fallen and disposed of by the agent, either for money or in exchange, regular accounts being made out by him to his principal. The dealings all took place in the name of the agent, and he was generally reputed to be the owner. The agent subsequently became bankrupt, and by another agreement with his principal, made *bona fide* after a secret act of bankruptcy, on which the commission was ultimately

*This exception applies as well to agents acting [*85] under a *del credere* commission as to others.(g)

And by the application of this principle, it has been held, that where one person, in pursuance *of [*86] an agreement, draws bills upon another for his own convenience, which are accepted, and remits goods to answer the amount, but takes up the bills himself, the acceptor is to be considered as a factor, in respect to the goods remitted, which, therefore, do not pass to his assignees.(h)(3)

2. If the goods be detained by the assignees, the princi-

founded, but more than two months before the date of the commission, transferred the timber of the principal then in his possession, and also other timber which he had obtained in exchange, back to the principal; who, thereupon, openly took possession and dealt with it thenceforth as his own. For the proceeds of this timber the assignees of the bankrupt agent brought an action against the banker, and at the trial Lord Tenterden seems to have been of opinion, that the case fell within the 72d section of the Bankrupt Act, and was not protected by the exception as to factors. But being also of opinion, that a resumption of possession by the true owner, upon an agreement *bona fide* made with the bankrupt more than two months before the date of the commission, would bring it within the protection of the 81st section of the Bankrupt Act, he recommended an inquiry before an arbitrator, for the purpose of ascertaining how much was actually resumed before the two months—which inquiry is still pending. *Shaw v. Harvey*, Guildhall Sittings before Michaelmas Term, 1830.† || As to the award of the arbitrator and the subsequent disposition of this case, see 1 Adolph. & El. 920.||

(g) *Garrat v. Oullum*, Bull. Ni. Pri. (5th ed.) 42; *Ex parte Oursell*, Ambl. 297. || *Thompson v. Perkins*, 3 Mas. 232, 235.||

(h) *Hollingworth v. Tooke*, 2 H. Bl. 502.

(3) † The expression in the text is scarcely accurate. The acceptor could not be considered as *factor*, in the mercantile acceptation of the word; but he would become, after payment of the bills by the drawer, *trustee* of the goods for him. Now it is a principle of the bankrupt law, of which the case of the factor above mentioned is itself one instance, that nothing will pass to the assignees of a bankrupt to which the bankrupt himself was not entitled *both in law and in equity*. And this principle being kept in view, will serve to explain what follows in the text. The question in all such cases is—1st. was the property clothed with a specific trust? 2dly, if it was, is it now specifically distinguishable from the bankrupt's general stock?‡

principal may sue for them in an action of trover ;(i) but subject to a lien for every thing for which the estate is creditor.(k)

Or if they have been sold before the bankruptcy, and notes, payable at a future day, received by the factor, these, *when distinguishable* from the bankrupt's property, follow the nature of the goods themselves ;(l) † and the rule prevails although the substituted property have been [*87] *acquired by a breach, and not in pursuance of the trust ;(4)† or if the assignees, after the bankruptcy, receive the money due on the notes ; or if the goods have been sold upon credit, and they receive the price from the vendees, after the bankruptcy, it may be recovered by the principal in an action for money had and received to his use ;(m) or by petition to the Lord Chancellor.(n) And it makes no difference that the factor has a *del credere* commission.(n)

(i) *Scott v. Surman*, Willes, 404.

(k) Per Eyre, C. J. 2 H. Bl. 504. *Zinck v. Walker*, 2 Bl. Rep. 1155.

(l) Willes, 404 ; 2 Ves. 674. || *Thompson v. Perkins*, 3 Mason, 241, post, 95. *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 317.||

(4) † *Taylor v. Plumer*, 3 M. & S. 562. In this case a draft for a large amount had been entrusted to a broker for the purchase of exchequer bills. The broker, however, misapplied the draft by purchasing American stock and bullion, with a view to absconding with the proceeds. Accordingly he did set out for America, but being seized before he quitted England, surrendered to the principal the securities and the bullion. A commission of bankruptcy subsequently issued against him, founded on an act of bankruptcy committed before the surrender, and the question was, whether the principal could retain the property surrendered against the assignees. The court decided that he could ; and Lord Ellenborough said, that " if property in its original state and form was covered with a trust in favor of the principal, no change of that state and form could divest it of such trust, or give the factor, or those who represent him in right, any claim of greater validity in respect to it than they respectively had before such change." † || Post, 337.||

(m) *Garrat v. Cullum*, Bull. N. P. 42 ; Willes, 405 ; *Ryall v. Rolls*, 1 Atk. 172.

(n) *Ex parte Murray*, Co. B. L. 400 ; *Scrimshire v. Alderton*, 2 Strange, 1182.

3. This exemption from the effect of bankruptcy is not confined to goods alone, but *specific securities* deposited with an agent for any special *purpose, as [*88] that of answering other specific bills drawn by the principal;(o) or for the purpose of being presented for payment, and which remain at the time of the bankruptcy, follow the same rule, which has been described as applying to goods in specie: and may, in like manner, and subject to the same lien,(p) be recovered in an action of trover,(q) or by petition.(5) Or if the assignees have parted with the securities, and received the money due upon them, it may be recovered in an action for money had and received to the principal's use.(r)

And if the transaction be clearly that of a deposit, it makes no difference that in calculating the amount to be drawn for, in return for the bills deposited, discount is deducted from the value of the latter for the time they have to run.(s)

Bills not due, deposited with a banker for the purpose of being presented for payment, are recoverable in specie on the amount, if received by the assignees, in an action for money had and received. And this has been so held, *notwithstanding that the banker, according [*89] to custom, enter the bills as cash in his customer's account, charging interest for the time they have to run,(t) provided the balance of the cash account, at the time of the bankruptcy, be in favor of the customer.(6)

(o) 2 Bl. Rep. 1156; 1 Atk. 233; *Ex parte Dumas*, 1 East, 551; Amb. 297. (*Ex parte Aiken*, 2 Mad. 192.)

(p) *Zinck v. Walker*, 2 Bl. Rep. 1156; *Ex parte Dumas*, 2 Ves. 586; *Ex parte Oursell*, Amb. 298.

(q) 5 T. R. 226; 2 H. Bl. 501; 1 East, 550. *Thompson v. Giles*, 2 B. C. 422.

(5) [*Ex parte Buchanan*, 1 Rose's B. C. 280.]

(r) 1 East, 554; *Giles v. Perkins*, 9 East, 12.

(s) 1 East, 550.

(t) 9 East, 12.

(6) See post, note (a). ¶ The general rule on the subject of tracing out the

4. But in order to prevent the effect of the bankrupt laws from attaching upon negotiable securities in the hands

right of property of a party notwithstanding the operation of bankrupt or insolvent laws, or any other mode of conversion, is so clearly expressed in the few following quotations, that the editor has introduced them,—although it might be deemed *actum agere*, after what has been stated in the preceding pages of the text, and the notes of the English editor. But the same subject may often be placed in such different lights, that what is obscure in one view may be clear and luminous in another.

The judgment of the Supreme Court of New York, in *Kip v. The Bank of New York*, 10 Johns. Rep. 63, (which, although stated to be, *per curiam*, bears the impress of a single judge, whose coinage cannot be mistaken,) presents the leading principles in a clear and condensed form. The court says: "It is a rule well settled,—that no estate vests in the assignees of a bankrupt but that of which the bankrupt had the legal and equitable title. Property that he held in trust never passes by the commission, and if that property consists of goods remaining in specie, or of notes and other *choses in action*, the *cestui que trust* is entitled to the property, and not the creditors at large. The only check to the operation of the rule is, when the property is converted into cash by the bankrupt, and has been absorbed into the general mass of the estate, so that it cannot be followed or distinguished. It is the difficulty of tracing the trust money, which has no ear-mark, that prevents the application of the rule. But here that difficulty ceases, for the money which was the proceeds of the trust goods was kept separate and distinct, and deposited as such with the defendants. The rule of equity and of law is the same in such cases, and the defendants are clearly accountable to the plaintiffs, and not to the assignees, for the money did not pass to the assignees."

Mr. Chancellor Kent, in his Commentaries, (vol. 2, p. 623,) after observing that, "if the factor should guaranty the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, the note taken by him as factor would still belong to the principal, and he might waive the guaranty, and claim possession of the note, or give notice to the purchaser not to pay it to the factor," [see ante, 87,] proceeds: "In such a case, if the factor should fail, the note would not pass to his assignees, to the prejudice of his principal; and if the assignees should receive payment from the vendee, they would be responsible to the principal; for the debt was not in law due to them, but to the principal; and did not pass under the assignment. The general doctrine is, that where the principal can trace his property into the hands of an agent or factor, he may follow either the identical article, or its proceeds, into the possession of the factor, or of his legal representatives or assignees, unless they should have paid away the same in their representative character, before notice of the claim of the principal. The same rule applies to the case of a banker who fails,

of a bankrupt agent, there must be a specific appropriation of them, as by lodging of bill for bill ; or by the deposit of several, in one entire transaction, to answer a particular purpose ; for if they be paid in from time to time upon a general running account, they become effects of the person to whom they are so paid, and are not reclaimable.(u) The doctrine is thus generally stated by Lord Hardwicke : “ If bills are sent by a correspondent to a merchant here to be received, and the money to be applied to a particular use, and the merchant becomes bankrupt before the money is received on the bills, the correspondent has a special lien in respect of those bills, and the money shall not be divided amongst the creditors at large. But where bills are sent on a general account between the correspondent and the merchant, and as an item in the account, it is otherwise.” *Ex parte Hournois*, 10th August, 1754.(v)

possessed of his customer's property. If it be distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner subject to the liens of the banker upon it.” The authorities referred to by the learned commentator, are principally those noticed *supra*:

So, in *Thompson v. Perkins*, 3 Mason, 232, 235. Story, J. says :— “ Nothing is better settled at the present day than the doctrine, that the principal is entitled to recover, whenever he can trace his own property, and distinguish it; or its proceeds, from the mass of the property of his factor. If it has been sold, and notes taken in payment, and these can be specifically ascertained, they remain the property of the principal ; and he has a right to receive them, discharging at the same time any lien of the factor.” See *Veil v. The Adm'rs of Mitchell*, 4 Wash. C. C. Rep. 105 ; *Price v. Ralston*, 2 Dallas, 60, 67 ; *Hourquebie v. Girard*, 3 Wash. C. C. Rep. 212.¶

(u) *Bent v. Buller*, 1 East, 551 ; 5 T. R. 494.

(v) *Ex parte Oursell*, Ambl. 297. ¶ The precise point, as to what is a specific appropriation, so that the bankruptcy of the agent shall not impair the right of the remitter of bills to pursue them in specie, was considered in a later case, in chancery. A merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter, in respect of all such acceptances, should be covered by means of bills, payable in London, to be remitted to him from time to time. Under such an arrangement, the presumption is, until an agreement to the contrary is shown, that the London correspondent was not intended, or entitled to treat

[*90] *5. But money which has been actually received

the bills so remitted, as cash, or to discount them before maturity ; and, therefore, it was held that two of such bills, that were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who remitted them. In this case, Lord Cottenham said : “ In the transactions between the foreign merchants and the London house, it appears that two bills, viz. : one for £1000, and another for £50, were remitted to the London house by the foreign merchants ; and the question is, whether these two bills belong to the assignees of the London agent, or to the foreign merchants. The law on this subject is laid down with sufficient clearness in the cases of *Thompson v. Giles*, (ante, 88,) &c., &c., the result of which is, that unless there be a contract to the contrary, if a person, having an agent elsewhere, remits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes a bankrupt, the property in the bills is not altered, but remains in the party making the remittance. That of course may be regulated by usage ; but *prima facie*, without special contract, the presumption is, that the bills are received by the agent for the purpose of indemnifying him against any eventual loss, and are not to be dealt with as his own, and immediately converted into cash. In *Ex parte Smith, in the matter of Power*, (Buck. 355,) a bill of exchange was remitted with a direction ‘ to do the needful,’ which was construed not to give the house to which it was remitted a right to sell the bill, but only a right to keep it until the time arrived, when it was properly payable. Unless, therefore, there is to be found, in the correspondence in this case a special contract authorizing the London agent to deal otherwise with the bills, viz. : to make them immediately his own, he would be bound to keep them until they became due. In order to make good the title of the assignees, and to displace the title of the remitters of the bills, it would be necessary to establish, from the correspondence, a contract entitling the London house to make the bills their own. The cases show, that unless there was such a contract, the London house were agents only for receiving the amount of the bills when due. Instead of containing any authority to the London agent to deal with the bills as his own, the correspondence proves the very reverse to have been the understanding of both parties. The only obligation of the foreign house, was to keep the London agent in cash to meet the bills when due. It was not intended to establish a cash balance in his hands. Another question might have arisen which it is not necessary for me to decide, because there are facts enough to enable me to dispose of the case independently of it. It is obvious that these remittances were made for the purpose of meeting certain obligations ; those obligations were not met ; so that the condition upon which the bills were remitted has not been performed ; and the London agent, therefore, it may be said, has not done that which was requisite to

by the bankrupt, and mixed with his funds,(A) either by negotiating the securities in his hands,(x) or as the price of goods entrusted to him for sale,(y) or to pay over to some purpose which it has not been applied to,(z) cannot be separated from his estate, and, as to that, the principal must rate with the other creditors, for money has no ear-mark by which it can be distinguished.(a)

complete his title. This, however, is a consideration into which I am not now called upon to enter. Here are the bills not disposed of, not discounted, and the obligation not performed. I think, therefore, that the foreign house have clearly established their title." *Jombart v. Woollet*, 2 Myl. & Cr. 390.||

(A) || In *Robson v. Wilson*, 1 Marsh. Ins. 295, Lord Kenyon says; "where a factor has received money belonging to his principal, and it becomes blended with his own estate, and cannot be distinguished from it, the principal must come in with the general creditors." And see *Kip v. Bank of New York*, 10 Johns. Rep. 65; ante, p. 89, n. 6.||

(x) *Ex parte Dumas*, 2 Ves. 582.

(y) *Willes*, 404.

(z) 1 East, 30; 9 East, 9.

(a) *Scott v. Surman*, *Willes*, 404. This is the reason assigned both by Mr. J. Willes, and in *Whitcomb v. Jacob*, Salk. 160, why money in the hands of an agent cannot be specifically claimed; and this is confirmed by Lord Kenyon's opinion, that if it be in a condition to be distinguishable, it may be claimed like any other thing. Lord Mansfield indeed, 1 Burr. 457, says, "It has been quaintly said, that the reason why money cannot be followed is because it has no ear-mark; but that is not true, the true reason is on account of the currency of it." But it must be observed, that Lord Mansfield was then considering the case, not of *reclaiming* money from the person with whom it had been deposited, but of *following* it into the hands of a third, to whom it had passed in currency. And it is only in that view that he expresses a disapprobation of the reason alluded to. And not only money, but negotiable securities, are subject to the same distinction; for though bills of exchange deposited with a banker are reclaimable in his possession, yet they cannot be followed into other hands to which they have come by the banker's assignment. 1 Bos. & Pul. 640.

[Although if endorsed, and consequently negotiable, bills are deposited with a banker, the latter has the absolute power of disposing of them, yet such an absolute right may, under circumstances, be qualified. As where the banker is agent for his country correspondent, to receive and pay bills for him, with an allowance for so doing; or where, in an annual account stated between them, the banker has entered the bills as the property of

[*91] And *if the factor at the time of the sale agree,

the correspondent ; in the one case the right is qualified by considering the banker as a factor, and the bills as remitted for a particular purpose, viz. to be received and carried to account as cash, when due, and his power over them as limited to that object ; in the second case, by raising an express declaration of trust, the right may also be considered as qualified. And although the banker enter the bills in his books as cash, or consider them as such, yet that will not extend his qualified right in either case, since his own books are not evidence for him, though they may be against him. *Ex parte Pease*, 1 Rose's B. C. 232. See also *Ex parte The Wakefield Bank*, *ibid.* 243, where a trust by implication was raised, so as to control the general authority of bankers to negotiate bills endorsed to them. *Ex parte The Leeds Bank*, 1 Rose's B. C. 254.]

‡ As the subject here treated of is one of great importance to all persons engaged in trade, it may be well to state concisely what is conceived to be the present state of the law affecting it ; and

1. A banker is to be considered as the agent of his customer. If property of the customer come into his hands to be dealt with in a particular manner, he is, as to that property, the *factor* of the customer, having the rights and liabilities belonging to that character.

2. Bills not due, paid in by a customer to his banker, are, in the absence of evidence to the contrary, presumed to be placed with him as an agent to procure the payment of them when due, and in such case the property remains in the customer. *Giles v. Perkins*, 9 East, 12.

3. If they are endorsed by the customer, the *legal* property in them is changed. *Laing v. Smyth*, 7 Bing. 284.

4. And if they are also *discounted* by the banker for the customer, they become the absolute property of the banker, and of course pass to his assignees as part of his estate ; *Carstairs v. Bates*, 3 Campb. 301 ; and the endorsement is *prima facie* evidence of discounting. *Ex parte Towgood*, 19 Ves. 299.

5. The taking of the banker's acceptances in exchange for bills paid in and endorsed is tantamount to a discounting, and, even though the banker's acceptances be dishonored, the bills will nevertheless pass to his assignees. *Hornblower v. Proud*, 2 B. & A. 327.

6. But bills may be endorsed by the customer, (and so the legal property be changed,) and may yet remain in the hands of the banker clothed with a trust for the customer, in which case, as has been already said, they do not pass to the assignees of the banker upon his bankruptcy. And the difficulty, in most cases, is to determine whether such a trust exists or not.

7. When the bills are *entered short* by the banker, that is to say, when they are entered as bills not yet available, and not carried to the general cash account, there is no doubt that they do not pass to the assignees, but must be given up to the customer. 1 Rose, 154.

instead *of taking the price in money, to set off a [*92]

8. And even though the banker have entered them in his own books as cash, and allowed his customer credit in account generally upon them, this will not of itself affect the customer, as the banker's books can be no evidence for himself or his assignees. 1 Rose, 239.

9. Much less if the customer have expressly directed the banker to get payment of them when due, or forbidden him to negotiate them; or the course of dealing between them raise an inference of such direction or prohibition. 1 Rose, 243.

10. If the customer have given the banker a limited authority to negotiate them under certain circumstances, as in reduction of the cash balance when unfavorable, or the like, this will of course not extend to other circumstances or to more bills than are sufficient for the purpose, and indeed will of itself negative any *general* authority to dispose of them. Ibid.

11. But if a general authority to negotiate them had been either expressly given, or is to be inferred from the course of dealing known and assented to by the customer, then, it *seems*, the customer is to be considered as having abandoned all property in the bills, which consequently pass to the assignees.

12. What circumstances are sufficient to raise the inference of such a general authority is a question of some nicety. Lord Eldon seems to have been of opinion, that if the bills were entered as cash with the knowledge of the customer, and he drew, or were entitled to draw upon the banker as having that credit in cash, he would thereby be precluded from recurring to the bills specifically. *Ex parte Sargeant*, 1 Rose, 152; *Ex parte Sollers*, *ibid.* 155; *Ex parte Pease*, *ibid.* 232; *Ex parte The Wakefield Bank*, *ibid.* 243; *Ex parte The Leeds Bank*, *ibid.* 254; and see 18 Ves. 229, 233; 19 Ves. 25, S. C. However, in all these cases his lordship held the assignees to very strict proof of such a course of dealing, and, in the absence of such proof, decided that there was no such general authority. The opinion of Lord Eldon, as conveyed, in this *dictum*, has been adopted and acted upon by the present Vice Chancellor in a recent case of *Ex parte Thompson*, 1 Mont. & M'Arthur, 102, which was certainly a strong case, for there, in an account of four years, there were but three entries of actual cash paid, the rest of the entries being entirely of bills, against which the remitters had been in the habit of drawing very extensively.

On the other hand it is said, that it is immaterial whether such a general authority exists, either expressly or from the course of dealing, if, at the time of the bankruptcy, the bills in fact remained in specie in the hands of the bankers, and the cash balance were in favor of the customer; and at all events, it is insisted, the circumstance of the customer taking credit for the bills, and drawing, or considering himself entitled to draw against them, does not make them the bills of the banker, because, in the actual course of trade, such a privilege is a consequence of paying in bills. The former part of this proposition is the opinion of Mr. Deacon, and is not without the

[*93] debt of *his own due to the purchaser, it is the
 [*94] same for *this purpose as if the money had been
 received.(b)

support of good reasoning, although it must be considered as doubtful. *Law and Practice of Bankruptcy*, vol. i. p. 432. The latter part is borne out by the case of *Giles v. Thompson*, 2 B. & C. 422, and *Ex parte Armistead*, 2 G. & J. 371.

13. The right to reclaim extends not only to the specific bills or securities, but to the substitutes for, or proceeds of them, so long as they continue in the same hands, and are specifically ascertainable. *Vullamy v. Noble*, 2 Mer. 593.

14. But if the proceeds cannot be distinguished from the general stock of the banker, the right of the general creditors prevails, and the customer must come in rateably with the rest; and herein consists principally the evil of endorsing of the bills by the customer, as it gives the banker the opportunity of negotiating them.

15. Neither can the customer follow them into the hands of third parties who have obtained them *bona fide* and for value, although negotiated by the banker against good faith. *Ex parte Pease*, 1 Rose, 288; *Collins v. Martin*, 1 B. & P. 648; *Ibid.* 546.

16. The banker, like a factor, has a general lien for advances made, and a right to be indemnified for liabilities contracted on an account of his principal, and the claim of the customer will consequently be modified by the state of the account. Therefore if the cash balance is against the customer, or if the banker has advanced money specifically upon the bills remitted, or has accepted other bills for the accommodation of the customer, the assignees will have a right to retain the bills, and even to put them in suit, until those sums are repaid and those liabilities discharged, that is to say, they will be entitled to a deduction of the amount in the first case, and to an indemnity in the second. *Jourdaine v. Lefevre*, 1 Esp. N. P. C. 66; *Davis v. Bowsher*, 5 T. R. 488; *Scott v. Franklin*, 15 East, 428; *Bosanquet v. Dudman*, 1 Stark. N. P. C. 1; *Bolland v. Bygrave*, R. & M. 271; *Ex parte Waring*, 2 G. & J. 403, and the cases before cited *passim*.|| And see post, 131, n. (3).||

17. It is a consequence of the right to an indemnity, that although the holder of the banker's acceptances in favor of the customer cannot directly come in and claim in his place as against the assignees of the banker, yet if the customer also become bankrupt whilst these acceptances are outstanding, as the holders must be satisfied before the assignees of the customers can be entitled to the bills, the Court of Bankruptcy will order such an arrangement between the two estates as to render the claim of the bill-holders indirectly available. *Ex parte Waring*, 2 Rose, 182; *Ex parte Inglis*, 19 Ves. 345; *Ex parte Parr*, Buck, 191.

(b) Willes, 400.

*However, since the want of identity is the only [*95] reason why money, which has once been confounded with the bankrupt's property, cannot be severed from it in specie, it follows, that if it have never been so confounded, but kept in separate bags, and be distinguishable from the other property, the law is the same as in the case of goods remaining in specie.(c) And, notwithstanding it may have been once confounded with the mass of the bankrupt's property, yet if it have got out of the general fund again, and be in a shape to be identified at the time of the bankruptcy, it may be specifically claimed.(d) As if money, produced by the sale of goods, have been laid out again in any specific thing, which is distinguished from the rest of the agent's estate, the thing so purchased does not pass under his bankruptcy.(e) So where a factor, having money of I. S. in his hands, bought South Sea stock in his own name, but entered it in his book as bought for I. S., it was determined that the stock did not pass by his bankruptcy.(f)

(c) Per Lord Kenyon, 5 T. R. 227. And per Buller, J. 1 T. R. 369; and see 3 Burr. 1369.

(d) *Ex parte Sayers*, 5 Vea. 172, 173, per Lord Chancellor.

(e) *Whitcomb v. Jacob*, 1 Salk. 160; *Ryall v. Rolls*, 1 Atk. 172.

(f) *Ex parte Chion*, 3 P. Wms. 184; † and see *Vullamy v. Noble*, 3 Mer. 593.‡ ¶ In *Veil v. The Adm'rs of Mitchell*, 4 Wash. C. C. Rep. 105. Washington, J. summed up the doctrine contained in the foregoing paragraph, as follows: "The cases upon this subject are uniform in laying down the rule, that where the principal can trace his property into the hands of the agent or factor, whether it be the identical article which first came to the hands of the factor, or other property purchased for the principal by the factor with the proceeds; he may follow it, either into the hands of the factor, or of his legal representatives, or of his assignees, in case he should become insolvent, or a bankrupt. The factor is a trustee for the principal, so long as he retains the property, or its representative in his hands; and his assignees, or legal representatives take it subject to the same trust, which they cannot defeat by turning it into money; unless indeed, they should pay it away in their representative character, *before notice* of the claim. It is in this point of view only, that notice is necessary." Courts of equity carry out the same principle in cases between trustee and

6. In the event of an agent's *death*, money received by him, and not laid out again in any *thing else, nor kept separate from his own funds, constitutes a debt due from his estate, as to which the principal is postponed to creditors of a higher class.(g) But if goods are

cestui que trust. *Murray v. Lyburn*, 2 Johns. Ch. Rep. 441 ; *Blagge v. Miles*, 1 Story's Rep. 452 ; 2 Story's Eq. Jurisp. § 1258.

A commission merchant sold the goods of several consignors, mixed indiscriminately in the same parcels, to the same persons, and in some instances took a negotiable note in his own name for the price, and in others charged the purchaser in account with the amount of his purchase. Afterwards by an indenture of assignment, he transferred all his effects in trust for the benefit of his creditors who should execute the indenture, which contained a release of all debts due from him. A consignor who had signed the indenture, and whose demand was included among the debts therein enumerated, brought an action against the trustees for the proceeds of his goods, and upon distinguishing by evidence his proportion of the accounts and notes collected by them, he was allowed to recover the same, the assignment being considered as not passing property thus held by the assignor in trust. Parker, C. J. said: "The consignor's property remains in the goods, and in the proceeds of them, saving the lien which the factor may have for advances and expenses. The consignors may pursue the goods or the price of them, notwithstanding such assignment. If it were not so, the property of the consignors, sold and unsold, would go to pay other creditors, who cannot be presumed to have trusted a factor on the faith of goods merely entrusted to him for sale. It is said that according to the usage proved, the factor has such a control over the notes as would be inconsistent with the claim of property by the consignees ; but we see no such inconsistency. No doubt the factor may, by breach of trust, or even with the implied assent of consignors, transfer the notes, or have them discounted to raise money, and innocent endorsees will hold them against the consignors but while they remain in his hands, or in the hands of his trustees, as in the case before us, the consignees may assert their right, either against the trustees, or the purchasers of the goods, if they have not made payment. If the consignor cannot obtain the notes to sue the promisors, a difficulty might arise ; but that would be between him and the vendee. The factor is still the trustee of the consignor, and a court of equity, with full powers, would reach the notes or the proceeds in his hands. But when he has received the money, or it has been paid to his trustee, the powers of a court of equity are not wanting to do justice." *Chesterfield Manufacturing Co. v. Dehon*, 5 Pick. 7. And see *Denston v. Perkins*, 2 Pick. 86.||

(g) *Burdett v. Willett*, 2 Vern. 638 ; *Whitcomb v. Jacob*, Salk. 160.

sold by a factor upon credit, and the money has not been paid at the time of his death but is received afterwards by his representatives, it does not become part of the assets, nor is liable to specialty debts: but must be accounted for to the principal, after deducting what may be due from him to the estate.(g) ¶ Goods of the principal in the hands of his factor cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor. This is an exception to the general rule that a landlord is entitled to distrain upon whatever may be found upon the premises;—an exception, with some of a similar character introduced in favor of trade and commerce.(A) *A fortiori* they cannot be taken in execution for the factor's debt.(B)¶

Goods remaining in specie come under the same rules as in the case of the agent's bankruptcy, which has been already explained.

Upon the death of one joint factor, the survivor is bound to account for both.(i)

In general the death of an agent puts an end to personal remedies for misconduct; yet where an agent has been guilty of fraud in selling at an under price, by collusion with the purchaser, though at law the action for the fraud is extinguished by his death, in equity it is considered as a debt for which the estate is liable, and a court of equity assumes jurisdiction upon that ground.(j)(5)

(g) *Burdett v. Willett*, 2 Vern. 638; *Whitcomb v. Jacob*, Salk. 160.

(A) ¶ *Gilman v. Elton*, 3 Brod. & Bing. 355.¶

(B) ¶ *Bevan v. Crooks*, 7 Watts & Serg. 452. But it seems that in either case,—of a distress or execution,—it must appear affirmatively that the party from whom the goods are taken, had the possession in the character of a factor. Ibid.¶

(i) *Martin v. Crump*, 1 Lord Raym. 340; 1 East, 366, ante, ¶ 52, 53.¶

(j) *Lord Hardwicke v. Vernon*, 4 Ves. 418; and see *Bishop of Winchester v. Knight*, 1 P. Wms. 406.

(5) † But as most of these cases can be turned into actions of *con- [*97] tract, upon either the express or the implied engagement of the agent, and as the action of contract survives, it may be laid down as a pretty general

rule that the estate of a deceased agent will remain liable to the principal for negligence or misconduct in the course of the agency. ¶ Where the tort arises in the course of an agency, from a fraud of the agent, and respects property, courts of equity will treat the loss sustained, as a debt against his estate. 1 Story's Eq. § 467.¶

Agents entrusted with the possession of goods or securities are responsible for the fraudulent misappropriation of them, not only to their employers civilly, but to the public criminally.

The occasion of the enactment which introduced this responsibility was as follows :—

Sir Thomas Plumer having contracted in July, 1811, for the purchase of a large estate, employed one Walsh, an eminent stock-broker, to sell out the requisite amount of stock. Accordingly, on the 4th of December, Walsh, who had himself fixed the time, sold out stock to the amount of 21,700*l.* under a power from Sir T. Plumer, and received the money, with a direction from Sir T. Plumer that it should be paid into his (Sir T. P.'s) own bankers (Goslings'), and invested the following day in Exchequer Bills: Accordingly the next day Walsh obtained Sir T. Plumer's check for a sum of 22,000*l.* and received from Goslings' bank notes to the full amount; and on the same day purchased with part 6500*l.* Exchequer Bills, which he lodged at Goslings, taking a receipt. The same afternoon, having first handed over to Sir T. Plumer the receipt for the Exchequer Bills, and given a false account as to the rest, he absconded with the produce of the remaining notes, which he had converted into American stock and doubloons. He was overtaken, brought back, and tried for stealing the check on Goslings given to him by Sir T. Plumer, but the judges upon a case reserved being of opinion that the facts did not constitute a larceny, he was acquitted.

The case had excited considerable interest, and immediately after the decision the 52 Geo. III. c. 63, was passed, for more effectually preventing the embezzlement of property delivered under such circumstances; and the provisions of this act, which is now repealed, are incorporated into the general larceny act of 7 & 8 Geo. IV. c. 29.

[*98] *By section 49 of the latter statute it is enacted, "that if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit, such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attor-

ney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

The 50th section provides, that the preceding enactment shall not affect trustees or mortgagees, nor prevent bankers, merchants, &c., from receiving money actually due on securities held by them, or from disposing of securities on which they have a lien, so far as may be necessary for satisfying their lien.

By the 51st section it is enacted, "that if any factor or agent entrusted for the purpose of sale with any goods or merchandize, *or [*99] entrusted with any bill of lading, warehouse keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent."

By section 52, offenders against these enactments are indemnified from the penal consequences of it "if they shall at any time previously to their being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been *bona fide* instituted by any

CHAPTER II.

THE RIGHTS OF AGENTS.

SECTION 1.

THE duties of agents towards their employers, and the corresponding remedies, being enumerated, the reciprocal rights and remedies of agents, with reference to their principals, come next under consideration. And first of the commission.

1. The commission of an agent(*a*) is either ordinary, or

party aggrieved, or if they shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

(*a*) The commissions on a consignment seem to be a good insurable interest. *Flint v. Le Mesurier*, Park, 268. || A commission merchant has such an interest in the goods consigned to him for sale, that he may insure them to their full value in his own name. *Brisban v. Boyd*, 4 Paige, 17; ante, p. 18, n. (*l*); *Robinson v. New York Ins. Co.* 2 Caines' Rep. 357; post, p. 102, n. (*d*); *Pouverin v. The Louisiana State Marine and Fire Ins. Co.* 4 Robinson's (La.) Rep. 234. There is no difference, in this respect, between insurances on marine risks, and insurances against fire. The consignee, who has received the goods of his consignor and has them in his own possession, may insure them in his own name, without regard to any beneficial interest which he may have in them, by way of commission, or otherwise, or if he be a simple bailee. It is the lawful possession of the goods which gives him an insurable interest. If he insures, in general terms against fire, in a certain store, the policy will cover all goods consigned to him for sale, as well as his own goods, which may be deposited there. In case of loss, he may maintain an action for the whole amount covered by the policy, without being compelled to separate the different claims of the different owners. The insurer has no right to look beyond the party named in the policy, although some stress may have been laid upon the terms of the policy, in this case, which however appears to have been in the form

del credere. The latter, it has been mentioned, is an increase of the ordinary commission, in consideration of the responsibility which the agent undertakes, by making himself responsible for the solvency of those with whom he contracts.(b)

The amount of the commission is either regulated *by a particular contract in each instance, or [*101] determined by the usage of trade ;(1) or in certain

usually adopted in the city of New York. The positions above stated are clearly deducible from the opinions of the judges. *De Forrest v. Fulton Fire Ins. Co.* 1 Hall, 84. But a supercargo, as such, has no right to insure against maritime risks ; for, until the arrival of the ship in the foreign port he has no possession of the goods, or power over them. *Ibid*, 114.|| See also what fell from Lord Mansfield in *Le Cras v. Hughes*, *id. ib.* and the opinion of the Court of K. B. *Craufurd v. Hunter*, 8 T. R. 13. || An agent cannot charge his principal with an *extra* compensation, for services, however onerous, if within his ordinary duty. *Marshall v. Parsons*, 9 Carr. & P. 656. Post, 102, n. d.||

(b) Ante, || 41.||

(1) ‡ And if there be no contract express or implied, and no usage, of course no commission can be recovered.‡ || This is expressed rather too broadly. If I employ a man to do my business, it does not follow that he is not entitled to a compensation, although there be no agreement or usage fixing its rate. In an action by a broker to recover brokerage for obtaining a charter for a vessel, no agreement having been shown it was left to the jury, in case they should find there was no practice on the subject, to give the plaintiff a reasonable remuneration. *Brown v. Nairne*, 9 Carr. & P. 204. And see *Burnett v. Bouch*, *id.* 620.|| [Thus, where a person performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held, that an action would not lie to recover a recompense for such work, the resolution importing, that the committee were to judge whether any remuneration was due. *Taylor v. Brewer*, 1 Maul. & Selw. 290. For cases where certain sums, by way of commission, have been allowed as being regulated by the usage of trade, see *Eicke v. Meyer*, 3 Campb. 412 ; *Cohen v. Paget*, 4 Campb. 96 ; *Roberts v. Jackson*, 2 Starkie's N. P. C. 225. See also *Levi v. Barnes*, 1 Holt's N. P. C. 412.] ‡ *Chapman v. De Tastet*, 2 Stark. N. P. C. 204 ; *Stewart v. Kahle*, 3 Stark. N. P. C. 361. Usage of course in this, as in all other cases, yields to positive agreement. See *Bower v. Jones*, 8 Bingh 65.‡ || Although there is a special agreement as to the compensation of an agent, it does not follow, but that he may be enti-

cases it is settled by Act of Parliament, (c) viz. by 12 Anne, st. 2, c. 16, s. 2, the rate of brokerage, to be taken by any broker or solicitor, for procuring a loan, is limited to 5s. for a hundred pounds, under a penalty of twenty pounds. (2) And by 17 Geo. III. c. 26, 10s. per cent is allowed to a broker or solicitor, for procuring a loan upon an-
 [*102] nuity. But it has been held, that a *solicitor who advances his own money, is not entitled to any commission by way of brokerage. (d)

tled to additional compensation, for additional services rendered in reference to his agency. *Perkins v. Hart*, 11 Wheat. 237; see post, 102, n. (d.)

(c) By 31 Geo. II. c. 10, s. 30, the commission of navy agents is fixed at 6d. in the pound.

(2) † And although the words of the act are confined to the procuring of a loan, yet the solicitor, &c. cannot charge a higher commission for labor in and about the procuring of such a loan, though he may not personally procure it. To allow this would be a manifest evasion of the act. *Pryce v. Wilkinson*, 2 Bingh. 470. ‡ By the Revised Statutes of New York, (vol. 1, 2d ed. p. 705, § 1,) "No person shall, directly or indirectly, take or receive more than fifty cents for brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars for one year, and in that proportion for a greater or less sum; nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance, or for any counter bond, bill, note or other security concerning the same."

(d) *Brouchead v. Eyre*, 5 T. R. 597. And see post, where the taking illegal commission is an offence. ‖ An agent entitled to a commission for effecting a loan, and becoming security for repayment, is not entitled to additional commission for paying over the same to his principal. *Colton v. Dunham*, 2 Paige, 274. Without a legal obligation, or an agreement to guaranty sales by him, he is not entitled to a commission for such guaranty. *Ibid.*

A supercargo was to receive as his compensation, a gross sum out of the proceeds of the return cargo, or a part of the cargo to that amount, on arrival at the place where the voyage was to terminate; on the vessel's return voyage she was compelled to put into a port of necessity, where the voyage was broken up, and the vessel and cargo sold; the supercargo cannot demand his compensation of his employers; but it is an insurable interest, and if a policy has been effected, there being a total loss, he may recover the whole from the underwriter. *Robinson v. New York Ins. Co.* 2 Caines' Rep. 357. Where a master is to receive a commission on the sale of goods laden on board of his ship, on the investment of the proceeds, as factor for the owner, he will not be entitled to the commission for merely

2. An agent employed in the management of an illegal contract, cannot recover any compensation for his labor

carrying and delivering goods in pursuance of an agreement made for the sale of them, and the payment for which he does not receive. *Miller v. Livingston*, 1 Caines' Rep. 349.

In the three cases of the *United States v. MacDantel*, *The Same v. Ripley*, and *The Same v. Fillebrown*, 7 Peters, 1-18-28, the question arose as to the right of a clerk in a public office, or other person having a fixed pay or salary, to allowance for the receipt and disbursements of moneys, by way of commission. Our law does not sanction the absurdity of a direct suit against the sovereign power for a debt due to an individual; but it is competent for an individual, when brought into court by the sovereign power, seeking to recover a debt due to itself, not merely to contest the validity of the claim; but to present counter claims going to the extinction or diminution of the recovery sought by the government. The counter claims of the defendants were therefore presented by way of set-off. In the last mentioned case, (*The United States v. Fillebrown*), which involves almost all that is pertinent to the present subject; the material facts were as follows. The United States instituted an action to recover a balance, certified at the treasury, against the defendant on the settlement of his accounts as secretary (with a salary of two hundred and fifty dollars per annum) to the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board, antecedent to his appointment as secretary; and also for commissions on the disbursement of moneys under the orders of the board. These claims were rejected by the accounting officers of the treasury, and were on the trial set up by way of set-off against the demand on the part of the United States. On the first trial in the court below, a verdict was rendered for the United States; but the court below granted a new trial, when the jury certified a balance in favor of the defendant; and a judgment was rendered for the defendant which was affirmed by the Supreme Court of the United States. Thompson J. delivering the opinion of the court, says, "Upon the trial, after the testimony was closed, the counsel for the United States prayed the court to instruct the jury as follows:—1. That if from the evidence aforesaid, it should appear to them that the defendant had accepted the appointment of secretary of the board of navy hospital commissioners upon the terms mentioned in the said appointment, and in the letter of Samuel L. Southard [secretary of the navy] to him; that in that case he was not entitled to any extra compensation for the disbursement of the moneys belonging to the said navy hospital fund; and that he was only entitled to 250 dollars a year, for the whole of the services performed by him for the said board.—2. That if they should be satisfied, by the evidence aforesaid, that the said board of commissioners had never passed any order or

from the person at whose request it was performed, and who has had the benefit of it. As where a person enjoy-

resolution for the payment of any commission, upon the moneys disbursed by the defendant for the said board ; and that the claims for commissions which he now makes, had never been sanctioned or settled by the said board ; that it is not competent for him now to set up the said claim for commissions against the claim of the United States, for which this suit is brought—which instructions the court refused to give. Whether the first instruction asked on the part of the United States ought to have been given, must depend upon the defendant's appointment as secretary, and the extent of his duties under that appointment. The court was requested to instruct the jury, that if the defendant had accepted the appointment on the terms mentioned, he was entitled to no compensation beyond his salary of 250 dollars, for any services performed by him for the board. The second instruction asked, involves the inquiry whether some order, or resolution of the board, for the payment of commissions was not indispensably necessary to entitle the defendant to the allowance claimed by him. [The case may, in reference to this point be referred to in another connection, but it has no immediate bearing upon the present object.] It is admitted on the part of the United States, that the defendant's being secretary of the board, forms no objection to his performing other services not included in his duty as secretary, and receiving a compensation therefor in the same manner as any other person might. The terms on which the defendant accepted the appointment of secretary, being to execute such duties, relative thereto, as should be required of him by the board ; it becomes proper to examine how the board considered the appointment, and what duties were required of him as secretary. It is proper here to inquire, how the secretary of the navy, as one of the commissioners stood in relation to the other members of the board.

“ It is evident from the manner in which this fund was created, and the purposes and objects to which it was applied, that the general and active superintendence over it belonged appropriately to the secretary of the navy. Mr. Southard, [secretary of the navy,] in his deposition states that he was, *by the direction of the board*, and by the previous practice and usage, acting commissioner of the fund, and attended to all matters connected with it. But when any new arrangements were to be made, or money to be expended in a new object, he consulted with, and had the approval and authority of the whole board ; and all his acts were considered as approved and sanctioned by the board. With respect to the 125 dollars claimed for six months salary, [in bringing up and arranging the records of the board, antecedent to the defendant's appointment as secretary,] Mr. Southard is very explicit. This allowance, he says, was made for *extra services*, and related to a time previous to his [the defendant's] appointment ; and that the allowance had the approbation of the board. It is not perceived what possible objection can exist against his being allowed this stipulated sum.

ing an office in the customs, employed another to procure the sale of it, undertaking to pay him a proportion of the

Whether or not it was more than a just compensation for his services, is a matter which this court cannot inquire into.

“ With respect to the commissions, Mr. Southard says, that subsequent to the appointment of the defendant as secretary, the commissioners were enabled by appropriations, and collecting money belonging to the fund from various sources, to proceed to apply the funds to the establishment of navy hospitals as required by the act of congress. That these funds were placed in the hands of the treasurer of the United States, as the treasurer of the commissioners; and that in collecting and disbursing the fund, it was found indispensable to have an agent who should attend carefully to it, and be responsible to the board. *That this did not belong to the duties of the secretary.* But that it was thought best to give the agency to him on account of his acquaintance with every part of the interest of the fund, and his fitness to discharge the duty. That he was appointed the agent with the understanding that he should receive compensation in the mode, and according to the practice of the government in other similar cases. That he is under the impression that this was to be a per centage on the money disbursed; and that he is also under the impression, that he did, by the *authority of the board*, allow one or more of the accounts presented by the defendant in conformity to the facts and principles he has detailed. From this testimony it is very certain that Mr. Southard considered the agency of the defendant, in relation to the fund, as entirely distinct from his duty as secretary, and for which he was to have *extra* compensation. And it is to be fairly collected from this deposition, that all this received the direct sanction of all the commissioners. But, whether it did or not, it was binding on the board; for the secretary of the navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board in judgment of law. It was, therefore, an express contract entered into between the board or its agent, and the defendant, and it was not in the power of the board after the service had been performed, to rescind the contract, and withhold from the defendant the stipulated compensation.

“ The instructions given to the jury are as follows: If the jury believe from the evidence, that the regular duties to be performed by the defendant as secretary to the commissioners of the navy hospital fund, at the stated salary of two hundred and fifty dollars per annum, did not extend to the receipt and disbursement of the fund; that the duty of receiving and disbursing the fund was required of, and performed by him as an *extra* service, over and above the regular duties of his said appointment; that it has been for many years the general practice of the government, and its several departments to allow to persons, though holding offices or clerkships, for the proper duties of which they receive salaries, or other fixed compensation,

purchase-money, it was determined that the agent could not support an action for the stipulated compensation,

commissions over and above such salaries or other compensation, upon the receipts and disbursements of public moneys appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labor and responsibility, apart from such ordinary and regular duties; and that the defendant took upon himself the labor and responsibility of such receipts and expenditures of the navy hospital fund, at the request of said commissioners, or with an understanding on both sides, that he should be compensated for the same, as *extra* service, by the allowance of a commission on the amount of such receipts and expenditures;—then it is competent for the jury in this case to allow such commissions to the defendant, on the said receipts and disbursements, as the jury may find to have been agreed upon between the said commissioners and the defendant; or in the absence of any specific agreement fixing the rate of commissions, such rate as the jury shall find to be reasonable, and conformable to the general usage of the government and its departments in like cases. These instructions were entirely correct, and in conformity to the rules and principles laid down in the former part of this opinion.”

So, in the case of the *United States v. MacDaniel*, 7 Peters, 1, 16, M'Lean, J. in delivering the opinion of the court, says: “An action of *assumpsit* has been brought by the government to recover from the defendant the exact sum, which, in equity, it is admitted he is entitled to receive, for valuable services rendered to the public, in a subordinate capacity, under the express sanction of the head of the navy department. This sum of money happens to be in the hands of the defendant, and the question is, whether he shall under the circumstances, be required to surrender it to the government, and then petition congress on the subject. If some legal provision be necessary to sanction the payment of the compensation charged, application should be made to congress by the head of the department, who required the service and promised the compensation. But no such provision is necessary. For more than fifteen years the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a department, because their chief under whose direction they had faithfully served the public, had mistaken his own powers, and had given an erroneous construction of the law. But the case under consideration is stronger than this. It is not a case where payment for services is demanded, but where the government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the sum of money for the recovery of which this action was brought. They think that the secretary of the navy, in authorizing the defendant to

though the service was performed, and the money received by his means.(e) † And again, where a stock-broker sued his employer for commission and money expended in the purchase of shares in a company which was illegal under 6 Geo. I. c. 18, it was held, that the action could not be maintained, though the shares had been purchased.(3)†

make the disbursements, on which the claim for compensation [viz., a commission at the rate of one per cent,] is founded, did not transcend those powers which under the circumstances of the case, he might well exercise." That there must be some sanction on the part of government to the services, for which an extra compensation is claimed, appears, as well from the two preceding cases, as from the case of the *United States v. Ripley*, 7 Peters, 18.

As to the allowance to receivers, it depends on the degree of difficulty, or facility experienced in the collection. If the amounts to be received are small and payable at short periods, five per cent appears to be the *maximum* allowed in the English Court of Chancery: if the amounts are large, and the collection easy, the compensation is diminished. *Day v. Croft*, 2 Beav. 488. But should not this circumstance be taken into consideration, that as the greater the amount received, so is the responsibility greater? In the state of New York, executors, administrators, and guardians are allowed a commission of five per cent, "for receiving and paying out all sums of money not exceeding one thousand dollars," which is diminished as the amount increases. Rev. Stat. New York, vol. 2, (2d ed.) p. 33, § 58; p. 86, § 21. By Rule 124, of the Court of Chancery of that state, masters making sales by order of the court are reduced to a very pitiful allowance which can, in no case, however large the amount received may be, exceed twenty dollars.¶

(e) *Stackpole v. Earl*, 2 Wils. 133, and see post, ¶ 116, 117.¶

(3) † *Josephs v. Pebrer*, 3 B. & C. 630.† ¶ So, where Waldo the plaintiff, who held an office for life, in the gift of one Farrer, agreed with Martin, the defendant, to resign, and to procure the appointment for him, and the defendant, in consideration thereof, agreed that the plaintiff should have a moiety of the profits; and the plaintiff resigned, and through his influence the defendant was appointed, and executed a deed for the performance of the agreement, which was not communicated to Farrer; it was held in an action of covenant by Waldo, against Martin, for not paying over to him a moiety of the profits of the office, that the agreement was a fraud upon Farrer, and therefore illegal and void: Abbott, C. J. (the only judge whose opinion is stated in the report,) observing: "I think that the plaintiff should have been nonsuited for want of proof that the bargain was made with the privity and consent of Mr. Farrer. The office was in the gift of that gentleman, and had he known that the effect of appointing the

[*103] *[But the court will not be astute to detect an illegality, and therefore it seems, that although a previous agreement, if carried into effect, might have rendered a contract illegal, yet, if the contract itself be capable of being legally performed by certain precautions being observed, the previous understanding will not deprive the agent of his right to commission. Thus, where A. commissioned B. to get a charter party effected on his ship, *Russian* built, and *British* owned, and she was accordingly chartered to go to *America*, and take in there a cargo of *permitted* goods, rice and cotton being specified, with which she was to sail to *Cadiz*, *Lisbon* or *Gottenburgh*, as directed; and by a previous agreement, it appeared to have been in the contemplation of the parties, to carry the goods to some port in the United Kingdom, and that the ship should carry no license, it was held, that this

[*104] was not such an *illegal contract as would deprive A. of his right to commission, for procuring the

defendant would not be to give him the emoluments of the office, but to divide them between him and the plaintiff, it is probable that he might have exercised his right of patronage in a different mode; it appears to me, therefore, that this secret agreement was a fraud upon Mr. Farrer, and void in law." *Waldo v. Martin*, 4 Barn. & Cress. 319.¶ The rule as to persons connected with illegal transactions is this. Whenever the illegality must necessarily appear in the prosecuting of the claim, the court will give no countenance to the action; but if the case be so far independent of the illegality that it may be kept out of sight altogether without prejudicing the right of action, the court will not allow it to be mooted as an objection. Thus in the cases just cited it was a necessary part of the inquiry *in and upon what* the labor and money had been expended, and *for what* the commission was claimed: and when it appeared that the transaction which was the subject of the claim was illegal, the court refused its aid. But we have seen before, (p. 62,) that an agent cannot shelter himself from paying over to his principal money which has come to his hands on account of the principal, under a plea that the transaction in respect of which the money was paid, was unlawful, because the only inquiry in such a case would be, did the agent receive the money, and on whose account did he receive it. This distinction will serve to explain the cases hereafter cited, as to the claim of an agent to be reimbursed money laid out for his principal in illegal transactions.¶ Ante, 63 n. (a).¶

charter party to be effected, because possibly the contemplated voyage might have been legalized.(4)]

3. The right to commission may also be forfeited by the conduct of the agent. Thus, an agent whose duty it is to keep an account, cannot support a charge for his labor, if he have kept none.(f)

(4) [*Haines v. Busk*, 5 Taunt 521.] † In this case the court were not only not astute in discovering an illegality, but practised great ingenuity to avoid seeing it. The adventure was illegal as contravening the navigation laws. The vessel could not trade to a British port without a license from the Privy Council. It was admitted by Ch. J. Gibbs, that a voyage to London was contemplated, but he said, although the agreement between the parties contained a stipulation that no license was *to be carried by the ship*, it did not follow that it was intended that *no license should be procured at all*. The authority of the case is much impugned by a subsequent decision of *Holland v. Hall*, 1 B. & A. 53. “The parties,” says Lord Ellenborough, in giving judgment against the plaintiff, “by this agreement appear to have contemplated one entire adventure, which was originally illegal; and I cannot discover that the illegal purpose was ever abandoned, or that anything was done to legalize it.” And Abbott, J. adds, “if there be on the face of the agreement an illegal intention, it is too much to say, that the burden lies on the party who uses expression *prima facie* importing an illegal purpose, to show that the intention was legal?”†

(f) *White v. Lady Lincoln*, 8 Ves. 371; || 15 Ves. 441; 1 Story's Eq. § 468.¶ Where an agent undertook a business without authority or stipulation for reward, the difficulty of ascertaining the precise wages he was entitled to, owing to his own conduct in keeping no account, was deemed a sufficient reason for disallowing the claim altogether. 11 Ves. 355. || The duty of an agent, as to keeping and rendering accounts, is clearly stated and explained by Parker, C. J. as follows: “The general rule laid down in the books is, that when goods are delivered to a factor, to be sold and disposed of for his principal, the law implies a promise on the part of the factor, that he will render an account of them, whenever called upon by the principal; and if he refuses to account, he is liable to an action of *assumpsit*; for the breach of his implied promise. It seems to have been formerly doubted, whether any action but account would lie against a factor: and afterwards it was thought that an express promise was necessary to maintain *assumpsit*. But the doctrine now settled is, that the undertaking to act as bailiff, is an undertaking to account: and Lord Holt, in the case *Wilkin v. Wilkin*, 1 Salk. 9, [ante, 58,] says, wherever one acts as bailiff he promises to render an account. If the general principle adopted by Holt is right, that the mere acting as bailiff is promising to account, it would not seem that a demand was in all cases necessary to enable the principal to

[*105] *‡ And if in consequence of his negligence or unskilfulness no benefit accrue to his employer

maintain his action. Indeed such a limitation of the liability of a factor would be exceedingly inconvenient and tend to the embarrassment of trade, for if a merchant, who sends his goods to a foreign country to be sold, can have no right to call for his money, the proceeds of his goods, until he has sent abroad to make a demand; the risk of loss from the failure of factors would be considerably increased, and the disposition to trust them proportionably impaired.

“ Generally the consignor of goods accompanies his consignment with directions how to apply the proceeds; either to pay them over to a third person; or to remit in bills, or in merchandize, or in specie; or to hold them to answer his future orders; and in these cases there can be no difficulty. For the factor cannot be liable, until he has actually or impliedly broken his orders. I say, impliedly, for if the factor should become bankrupt or insolvent, with the goods of the principal, or their proceeds in his hands, so that he is disabled from remitting them, or otherwise appropriating them according to the instructions of the principal, there seems to be no reason, why an action would not immediately lie against him; by analogy to the common law principle, that when a duty is to arise upon a demand, and the party liable has disabled himself from performing, the necessity of a demand ceases. And if this were not so, creditors here, who could not for a long time cause a demand to be made, would have no opportunity of securing themselves out of the effects of the factor in this country: while creditors of a different description, but not more meritorious, would meet with no impediment in securing their debts. The practice here has conformed to this principle: for many cases are known to have occurred, of actions brought and sustained against factors in foreign countries, although no demand had been previously made upon them, to render an account.

“ It is also the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient: so that a factor abroad, who should receive goods to sell, without special directions as to the mode of remittance, would be held, according to the course of business, to give his principal information of his progress in the transaction; and if he should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract, and subject him to an action. So, if he should render an untrue account, even without any intention of fraud claiming greater credit than he was entitled to, so that the balance shown was not true, we conceive the principal would have a right of action without a demand. For he would not be obliged to submit to such charges as the factor should choose to make, or to wait, perhaps at the risk of his debt, until his agent should voluntarily correct his account, and acknowledge a just balance. But if the factor should receive and sell the goods, without

from the service performed, he forfeits his right to commission.(5)

So also if he depart from his character of agent for his employer, and act adversely to him in any part of the transaction. Thus, where a broker having made a purchase for his principal at a month's credit, was induced at the solicitation of the seller to delay the delivery of the goods till the expiration of the credit, and then to tender them on payment, he was considered not only to have forfeited his commission, but to have precluded himself from

any special orders as to remittance, upon an understanding express or implied, that he is to hold the proceeds to the order of his principal; and if he does nothing in violation of those orders, or to disable himself from complying with them when they shall be received; and transmits a true account of sales, in a reasonable time, according to the course of business; and is ready to remit or answer drafts upon him; we think that no action will lie against him for the balance in his hands. For his contract is to sell and render an account, and he ought not be held to remit at his own risk; and he cannot remit at the risk of his principal, unless in compliance with instructions." *Clark v. Moody*, 17 Mass. Rep. 145, 148, et seq.

The more extensive the transactions, the more imperative is the duty of keeping a regular account of receipts and payments; and if the agent has neglected to perform it, the inconvenience and loss resulting from the omission must fall upon himself. *Jenkins v. Gould*, 3 Russ, 393.

To account is not merely to render a statement of the amount for which goods were sold, but to pay the proceeds to the principal. Bayley, J. says: "It cannot be contended that an agent has duly accounted, unless he pays over the full price." *Brown v. Staton*, 2 Chitt. Rep. 353.||

(5) + *Deneo v. Daverell*, 3 Campb. 451; *White v. Chapman*, 1 Stark. N. P. C. 113; *Hamond v. Holiday*, 1 C. & P. 384. || "No principle of law is better established than this, that a party cannot enforce a charge for doing business which is useless to his employer" *Tindal, C. J. Shaw v. Arden*, 9 Bing. 287. See *Hill v. Featherstonhaugh*, 7 Bing. 569; *Money-penny v. Hartland*, 1 Carr. & Payne, 352; S. C. 2 Carr. & Payne, 378; 1 Steph. N. P. 305; *Clark v. Moody*, 17 Mass. Rep. 152; *Dodge v. Tilston*, 12 Pick. 328. In *Hamond v. Holiday*, (ubi supra,) Best, C. J. says; "The law, as it relates to commission, I take to be this—a man must complete the thing before he can be entitled to charge for it." The chief justice then proceeds;—"but although he does not do the whole, yet he may be entitled to remuneration in proportion to what he has done." Is there not, here, an inconsistency? If he is entitled to a *pro rata* compensation, it must arise from the usage of trade. Post, 106.||

recovering the money which he had paid for price and duties.(6)†

4. If an agent be made executor to his employer, the character of agent, and the right to commission ceases. A principal resident abroad, who was in the habit of making remittances to his agent, and allowing him commission upon them, having died after appointing the agent his executor, the latter was not allowed to charge commission upon sums which had been sent by the principal in his lifetime, but not received till after his death.(g)

(6) † *Huret v. Holding*, 3 Taunt. 32.†

(g) *Hovey v. Blakeman*, 4 Ves. 596. ¶ So, in a case in which commission was claimed partly on moneys which had been received by the executor, who had been a commission agent of the testator, in the lifetime of the testator; partly on moneys which had been received after the death of the testator, but in respect of sales made through the agency of the executor in the lifetime of the testator; and partly on moneys received after the death of the testator, where the sales had also taken place after the testator's death, though the agency had commenced in his lifetime:—Leach, M. R. declared, “that the executor was entitled to commission on all moneys received and paid by him prior to the death of the testator; and that, as to all moneys received or paid by him subsequently to the death of the testator, he was entitled to be paid for any trouble taken by him before the death of the testator in regard thereto, at the same rate that any other agent would be entitled to be paid for such trouble, according to the usual course of mercantile employment; and he referred it to the master to take the account accordingly.” *Sheriff v. Axe*, 4 Russ. 33.

The same principle has been extended to other cases. Thus, where a solicitor was a trustee, he was not allowed for services in that capacity, but only for costs paid out of pocket; although the trust deed allowed him to retain all reasonable costs, charges and expenses which he might sustain, or be put unto. *Moore v. Frowd*, 3 Myl. & Cr. 45. In *Re Sherwood*, 3 Beav. 338, Lord Langdale, M. R. said; “A solicitor, who is also a trustee, is not entitled to charge for professional services which must be assumed to have been rendered in his character of trustee, unless there be some special contract authorizing him to make the charge; but under a deed or contract properly entered into and expressed, he may be entitled to his professional charges as a solicitor, though he act as a trustee. In several cases of wills, and amongst them that of Lord Thurlow, a solicitor has been authorized to make his professional charges. In *Moore v. Frowd*, (ubi supra,) it was considered clear from the form of the instruments, that the professional costs of the solicitor were not comprised in the costs to be

5. If a servant, who by his agreement has engaged to give up his time and attention to the *con- [*106] cerns of his employer, hire out his service to another, and the employer receive the consideration paid for those services, the servant cannot recover it from him.

allowed; but in the present case there is a special contract, and there is no allegation that it was obtained by fraud or any improper means."—So, where business relating to a trust estate was transacted by two solicitors in partnership, one of whom was a trustee of the estate; it was held, that, in passing his accounts, costs out of pocket alone could be allowed. *Collins v. Carey*, 2 Beav. 128. In New York executors, &c., are, by statute entitled to a commission, (ante, p. 102, n. d., sub fine,) and therefore the rules above stated would apply with less hardship.

In the matter of the *Bank of Niagara*, 6 Paige, 213, where in pursuance of a statute of the state of New York, receivers had been appointed for the estate and effects of an insolvent corporation, the master, to whom the accounts of the receivers were referred, made an allowance to one of the receivers who was an attorney and counsellor, for examining certain claims in favor of, and against the company; in addition to between two and three thousand dollars of taxed costs in relation to the fund;—Mr. Chancellor Walworth said; "The receiver was not entitled to charge for extra counsel fees to himself, in addition to the legal taxable costs in suits prosecuted or defended by him as attorney or solicitor; nor was he entitled to any allowance in the character of counsel for himself, or his co-receiver, in relation to any other matter. The employment of counsel, and the payment of a proper allowance for such services, when necessary, requires the exercise of a sound discretion on the part of the receivers, or the trustee of the fund out of which such services are to be paid. It would therefore be as unsafe to allow a receiver or other trustee to contract with, and pay himself for such extra services, as it would be to allow him to become the purchaser of the trust property which it is his duty to sell to the best advantage for the benefit of the estate. If he employs third persons as counsel, and where he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger, that the estate entrusted to his care will be charged with counsel fees which might safely have been dispensed with. No allowance for extra counsel fees to himself can, therefore, be made to a receiver, or other trustee, upon the settlement of his accounts."

A partner being, as it were, the agent of the copartnership, cannot charge any extra allowance beyond what is stipulated or implied from the terms of the partnership, usually being a ratable portion of the profits. *Franklin v. Robinson*, 1 Johns. Ch. Rep. 158; *Caldwell v. Leiber*, 7 Paige, 483; *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 326; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. Rep. 69. But where the several joint owners of a cargo appoint

Thus the master of a ship employed by the owner upon a certain voyage, having let out the services of the ship to government at a stipulated freight, besides a per centage for his own labor, and the whole having been paid into the hands of the owner, it was held that he was not bound to pay over any part of it to the master.^(h)

‡ By the usage of trade,^(A) a ship-broker is not entitled to charge a ship-owner for his commission, or even any remuneration for his labor in procuring a charterer for the ship, unless the charter party be actually entered into; and this even though the contract be broken off by the fault of the owner.⁽⁷⁾ The commission allowed

one of their number their agent to receive and sell the cargo, and distribute the proceeds, he is entitled under such special agency to a commission or compensation for his services as a factor, or agent, in the same manner as a stranger. *Bradford v. Kimberly*, 3 Johns. Ch. Rep. 431.¶

^(h) *Thomson v. Havelock*, 1 Campb. 527. ‡ This is a general rule applicable to all cases in which the relation of master and servant exists. The master is entitled, in the absence of any stipulation to the contrary, to the sole and exclusive service of the servant in the course of employment for which he has retained him. Whatever service, therefore, is performed by him for another, in the same course of employment, is to be considered as done *for the master*.‡ ¶ Where an apprentice is employed without the knowledge or consent of his master, the master is entitled to all his earnings, whether the person who employed him did, or did not know that he was an apprentice; but in the case of a hired servant, the employer must have notice of his being the servant of another to make him responsible. And where an apprentice ran away from his master and entered on board of a ship and signed articles by which he engaged to perform the whole voyage, and to forfeit his wages in case of desertion, or embezzlement; and during the voyage he deserted, having been guilty of embezzlement, it was held, that the master was entitled to recover his whole earnings from the ship owners during the time he was on board, without any deduction for wages advanced to the apprentice, though neither the owners nor captain knew that he was an apprentice. *James v. Le Roy*, 6 Johns. Rep. 274; *Eades v. Vandeput*, 4 Doug. 1.¶

^(A) ¶ Mr. Justice Bayley, in *Read v. Rann*, 10 Barn. & Cress. 438, distinguishes between usage and custom. "Usage," he says, "is the legal evidence of custom." The same distinction is pursued by the other judges.¶

⁽⁷⁾ ‡ *Broad v. Thomas*, 7 Bing. 99; *Read v. Rann*, Lloyd & Welsby's Mer. Cas. 121, and see the note to that case; ¶ S. C. 10 Barn. & Cress.

*when the charter party is effected is of course [*107] proportionably high. And though a charter party have been executed, if the stipulated commission be a percentage on the freight earned, the broker can recover nothing until freight has been earned.(8)

Bankers are allowed by usage a commission for agency: and although 5 per cent be taken by them as interest on advances, the additional charge for agency, if *bona fide* made, does not make the loan usurious:(9) and whether the charge is *bona fide* or colorable, is a question for the jury.(10)

438.¶ *Dalton v. Irvin*, 4 C. & P. 289. There seems to have been some doubt about the usage, which may now be considered as set at rest. In *Haines v. Busk*, 5 Taunt. 521, || S. C. 1 Marsh. Rep. 191,|| the question was not raised, and the broker recovered 2½ per cent. commission, though the charter party had not been effected.↓

(8) ↓ *Winter v. Mair*, 3 Taunt. 531.↓

(9) ↓ *Winch v. Fenn*, 2 T. R. 52, (n); *Masterman v. Cowrie*, 3 Campb. 488; *Baynes v. Fry*, 15 Ves. 120; *Ex parte Jones*, 17 Ves. 332; 1 Rose, 29; 5s. per cent is the usual charge.↓

(10) ↓ *Carstairs v. Stein*, 4 M. & S. 192.↓ || A fuller statement of the cases referred to in this, and the preceding note, with some in addition, seems to be so much required by the importance of the subject, that the editor conceives himself excused in introducing it. A reasonable commission beyond legal interest for extra incidental charges, or upon agency in the remittance of bills, is not usurious. *Baynes v. Fry*, 15 Ves. 121. Bankers who discount a bill or note payable at another place, may in addition to the legal interest, or discount of 5 per cent, lawfully take a reasonable and customary sum for remitting the bill or note for payment, and other necessary and incidental expenses; for if they were allowed only 5 per cent, upon the whole transaction, they might, in consequence of the expenses they incur in their establishment, obtain less remuneration in the discount than other individuals. And the right to receive this additional remuneration does not appear to be confined to cases where the bill is payable at a different place to that where the banker resides, but extends to bills payable in the same place: and though it has been considered, that the case of bankers is dissimilar to that of other persons, on account of the nature of their business, and of the peculiar expense attending it, yet it seems, that a merchant, or other person, may, under circumstances, legally receive a commission on discounting bills, as where he has considerable trouble in keeping accounts for the party so charged. *Auriol v. Thomas*, 2 T. R. 52; *Winch v. Fenn*, *ibid*, n.; *Masterman v. Cowrie*, 3 Campb.

492; *Marsh v. Martindale*, 3 B. & P. 158. Country bankers are entitled to a commission on the discount of bills, although sent from London by a person resident there. *Ex parte Jones*, 1 Rose, 29; 17 Ves. 332. With respect to the *amount* of the commission which a banker may charge either for discounting, receiving, accepting or paying bills, there appears to be no settled rule, but it is a question to be left to the jury upon the evidence, whether the charge is reasonable and commensurate with the trouble and expenses incidental to the transaction; if it exceed a fair remuneration, and be mixed with an advance of money, then the transaction will be usurious; the usual commission sanctioned by decisions is 5 per cent. And where a party charged one-half *per cent*, for commission on discounting a bill, without proving that he had been put to expense, or any considerable degree of trouble in conducting the transaction, it was deemed usurious. *Carstairs v. Stein*, 4 M. & S. 192. The charge of 10s. *per cent* for commission on a loan of money is not usurious, if it be referrible to trouble and expense *bona fide* incurred by the lender; notwithstanding he may not be a banker, or a person engaged in trade, or that the money lent is his own. *Ex parte Gwynn*, 2 D. & C. 12. A person accommodating another by accepting a bill cannot, like a country banker discounting a bill, take anything above 5 *per cent* interest by way of commission, without committing usury. *Kent v. Lowen*, 1 Campb. 178. See 1 Steph. N. P. 923, from which the foregoing statement is borrowed.

That a claim for commissions will not avail as a cloak for usury, see *Dunham v. Dey*, 13 Johns. Rep. 40; *Dunham v. Gould*, 16 Johns. Rep. 367; *Fanning v. Dunham*, 5 Johns. Ch. Rep. 134, 135; *Dey v. Dunham*, 2 Johns. Ch. Rep. 193; *Colton v. Dunham*, 2 Paige, 267; *Williams v. Hance*, 7 Paige, 581; *Bullock v. Boyd*, 1 Hoff. Ch. Rep. 294, 298. And that no usage will countervail the provisions of the statute, see *Dunham v. Gould*, *ubi supra*; *The N. Y. Firemen Ins. Co. v. Ely*, 2 Cow. 678.

An agreement that an agent or factor shall receive a reasonable compensation to be paid by the principal for accepting and paying bills with funds furnished by the latter, is not *per se* usurious. Nor is it necessarily usurious that the agent not being in funds of his principal, makes advances on his drafts, on which he charges interest, with his commission in addition. *Suydam v. Bartle*, 10 Paige, 94.

The plaintiffs were in the business of commission merchants, and of receiving goods and produce, and freighting the same to New York. They accepted the drafts of a country merchant, under an agreement, that the produce should be in their store, at or before the time when the drafts became payable. In their account with the defendant, they charged a commission of two and a half per cent on the amount of the money advanced to meet drafts, where the defendant failed to send produce in time, according to his agreement, and interest on the items charged in their account, from the time they became due. It was proved, that the defendant had transacted business with the plaintiffs, for several years, and the plaintiffs had uniformly charged a commission of two and a half per cent, on advances made to meet the drafts of the defendant; and that such was the practice

of other persons in the same line of business. The court allowed the charge for commission : and Spencer, C. J. in delivering their opinion says : " There is no pretence for saying that the commission of two and a half per cent charged by the plaintiffs for accepting and paying the defendant's drafts, when the plaintiffs had not funds in their hands belonging to the defendant, out of which to pay the drafts when due, was usurious. There is nothing in this case, showing that this was a cover for the loan of money ; but it was charged [by the plaintiffs] and assented to by the defendant, as a reasonable compensation for the expense and trouble in negotiating the business in relation to the drafts. It is entirely a different case from that of *Dunham v. Dey*, (ubi sup.) &c.—In *Palmer v. Baker*, (1 Maule & S. 56,) the question was, whether the sum of 200 pounds agreed to be allowed as a compensation for trouble, in addition to the reservation of five per cent interest, was intended as an additional *bonus* for the advance of money or not. The judges placed their determination of the cause on the inquiry, whether the reservation was a motive for the advance of the money. If it was, they pronounced it usurious : but if it was referrible to the trouble only, then they pronounced the transaction a fair one. I am perfectly satisfied, that, in this case, the two and a half per cent, was never intended as a cover for the advance of money, with a usurious intention, but that it was a fair, usual and customary allowance, for the trouble and inconvenience in transacting the business." *Trotter v. Curtis*, 19 Johns. Rep. 160. And see *Bullock v. Boyd*, 1 Hoff. Ch. Rep. 304.

An action of *assumpsit* was brought in the Court of Common Pleas of New York, by Dilworth & Voorhees, endorsees, against Coster, payee and endorser of a promissory note made by M. The defence was usury ; and it appeared on the trial, that the note was a renewal of one made for the accommodation of M. to secure money which one Johnson, at the request of M. procured of one W. at lawful interest ; but M. agreed to pay Johnson three per cent a month, which had been done. The question referred to the jury was, whether Johnson was the agent or principal : if the former, and the three per cent was given to him for extraordinary services, as such, and did not form a part of the interest taken by W. the note was not usurious : otherwise, if Johnson was principal, himself discounting the note, though the money was obtained by him from another. A verdict was rendered for Dilworth & Voorhees, the endorsees of the note ; and the case having been brought before the Supreme Court by bill of exceptions, the judgment of the court below was affirmed. Savage C. J. says : " The proper question was put to the jury. They have negatived the fact set up by the defendant below, that Johnson was a principal ; which leaves the case much like that of *Dugnall v. Wigley*, (11 East, 43.) In that case, a bill of exchange, procured like the note now in question, was held not to be usurious, upon the ground that the person advancing the money, received no more than legal interest, the person receiving more, a broker, being the drawer's own agent." *Coster v. Dilworth*, 8 Cow. 299. But, in equity, a creditor is not allowed to make it a condition of a loan that he shall receive a compensation for his services in procuring the money. " This court,"

SECTION 2.

1. Agents are entitled, besides their commission, to be reimbursed all advances made in the regular course of a legal employment. Such are the incidental charges for duties, warehouse-room, &c. and all payments made for the necessary preservation of property committed [*108] to their care.(a) *And cases may occur in which

says Kent Ch. "is always jealous of collateral demands and advantages claimed by a creditor, as a *condition* of the loan of money. They have a tendency to usury and oppression. On this ground it is, that a mortgagee cannot *originally* stipulate for a collateral advantage, as that the interest, if not paid at the end of the year, shall be converted into principal, or that the mortgagee shall be a receiver of the rents and profits, with a commission." *Hine v. Handy*, 1 Johns. Ch. Rep. 6.

A bank at Erie, Pennsylvania, in discounting a bill on New York, at a time when the difference of exchange between the two places was one half of one per cent in favor of the latter, exacted that amount beyond the rate of discount fixed by its charter, as a charge for collection; the bank moreover being then engaged in selling drafts on New York, at a premium of one half of one per cent. It thus appearing that the trouble and expense of collecting was compensated by the difference of exchange, and the excess beyond the legal discount being entirely unexplained; Nelson C. J. delivering the opinion of the court said, that, were it necessary to the decision of the case, he would not hesitate to hold the bill to have been discounted in violation of law, and that therefore the bank could not recover upon it. But it might be otherwise had the difference of exchange been in favor of Erie, and the bank had only exacted that, in addition to the rate of discount fixed by its charter, together with a suitable charge for collection. And so, had the bill been payable at the bank, and the borrower wished to have the proceeds placed at some distant point, the former might have been justified in deducting the rate of exchange between the two places, and a proper sum for remitting the funds. *The Bank of the United States v. Davis*, 2 Hill, 452.||

(a) 1 Roll. Ab. 124, pl. 7; || *Colley v. Merrill*, 6 Greenleaf's Rep. 50. So, an agent is entitled to reimbursement for all damages and costs to which he may have been subjected in the due performance of his agency. Thus, in an action of *assumpsit*, in which the declaration contained only the money counts, it appeared that the defendant being in want of money, applied to the plaintiff to inform him how he should draw £100, from a relation in Scotland; the plaintiff advised him to draw a bill of exchange in favor of

they are justified in making advances without particular directions, and under exigencies not provided for by the

the plaintiff, for that amount, on the person in Scotland, and send the same to him, and he would forward it; and as soon as advice was received of the payment of the bill, the plaintiff would pay him the money; the defendant accordingly drew the bill which the plaintiff endorsed and negotiated; and the bill being returned protested for non-payment, the plaintiff, as endorser had to pay 20 per cent damages, with the charges of protest. A verdict taken for the plaintiff for the amount of his demand, was sustained by the court. Thompson, C. J. says: "It is evident from the facts stated in the case, that the plaintiff, in the negotiation of the bill of exchange, acted as the mere agent of the defendant, without any expected benefit to himself; and it was an agency too, of the most unlimited discretion. Application was made by the defendant to him for advice and direction how the money should be drawn for, and the mode adopted was that suggested by the plaintiff. Nothing particular appears to have passed between the parties, as to the manner in which the bill was to be disposed of; whether to be sold here by the plaintiff or not. But it appears to be admitted that the plaintiff acted in good faith, and without any view to his own benefit, and his having made himself responsible for the damages on the bill, by reason of his endorsement, was solely for the accommodation of the defendant; it would be most unreasonable and unjust that he should not have a remedy over against the defendant for the damages so paid upon the bill. If the defendant is at all liable, it must be on the ground that the plaintiff acted as agent in this business, and has paid these damages upon this returned bill, in his character as agent. If so, it was money paid for his principal; and this is the light in which the transaction must be viewed. No objection, therefore, can be made to the form of the action." *Ramsay v. Gardner*, 11 Johns. Rep. 439. Where the trustees of an incorporated village, who were sued for an act done by them, *virtute officii*, in the faithful discharge of their duty, as trustees and agents of the corporation, incurred necessary costs and charges in and about their defence, it was held that they might maintain an action of *assumpsit* against the corporation, or their successors in office, for the amount of the costs and expenses so paid by them. *Powell v. The Trustees of the Village of Newburgh*, 19 Johns. Rep. 284. Where A. as agent of B. received certain goods belonging to B. in Cape François, by virtue of the decree of a competent tribunal there, in opposition to a claim to the same goods set up by C. and then sold the goods and remitted the proceeds to B.; and four years afterwards a suit was instituted by C. against A. founded on the former proceedings and connected therewith, and A. was compelled through the tyranny of the President Christophe, to confess judgment for the sum at which the goods had been valued, and to admit, contrary to the truth, that at the time of receiving the goods he promised to pay C. that sum, it was held that A.

regular rules of their business. Thus, according to Mr. J. Buller, if an agent acting for the best, but without orders, insure a cargo on account of the lateness of the season, or other good cause, he is entitled to charge the principal with the premium.(b) And in such a case, even the assent of the principal would be inferred from very slight circumstances.(b)

But, in general, authority to advance premiums on insurance must arise either from usage or special direction. An agent empowered by deed to act as husband of a ship(A)

might recover from B. his principal, the amount thus paid. *D'Arcy v. Lyle*, 5 Binn. 450. So, in *Storking v. Sage*, 1 Conn. Rep. 519, 522, Swift, C. J. said: "where an agent acting faithfully, without fault, in the proper service of his principal, is subjected to expense, he ought to be reimbursed. If sued on a contract made in the course of his agency pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him, and refund the expense. For this he can maintain an action of *indebitatus assumpsit*; and the proof of these facts will be sufficient to warrant the jury to find the promise."|| It has been held, that if a factor resident abroad, at his own risk and peril, evade the payment of foreign customs, he is entitled to charge them as paid. *Smith v. Oxendon*, 1 Ch. Ca. 25; Eq. Ca. Ab. 369. But not so of home customs, because it is a fraud upon the king. *Borr v. Vandall*, 1 Ch. Ca. Ab. 30; Eq. Ca. 370. In a subsequent case, however, Lord Keeper North expressed himself dissatisfied with the reason given for allowing the former, viz., the factor's risk, because he says the factor ventured his master's goods as well as his own life. 13 Vin. Ab. 3. But in a case before Holt, C. J. at Guildhall, a factor of the East India Company carried over £1200 in gold to India, where a custom was due for it and never paid; *et per Curiam*, the factor shall have the benefit, and not the East India Company, for it was due from them, and ought to have been paid; and therefore they cannot make a title to it against one who hath the possession, for that is sufficient in all cases but against him that hath the very right, and the non-payment in this case was at the peril of the factor. 3 Salk. 235, and see Skinn. 149. † Can this be right? † || If at law, certainly not in equity, where the rule is incontrovertible, that a trustee, or other person holding a fiduciary situation, cannot derive a collateral, or incidental benefit from the management of the trust. Ante, 34, n. (m); 51 and n. *ibid.*||

(b) *Wolfe v. Horncastle*, 1 B. & P. 323.

(A) || The author having no where defined the meaning of the term *Ship's Husband*, the following definition is borrowed from 1 Liv. Pr. &

in the customary way, and to make advances in that character, is not thereby authorized to insure for the owners without *express orders; nor will the di- [*109] rection of one part-owner be sufficient against the rest, so as to entitle the agent to repayment from them of the sums advanced.(c) But acquiescence by the owners, upon being informed of the insurance, will be sufficient to render them liable.(c)

Ag. 72. "Ship's husbands are a class of agents, whose chief employment in seaport towns is, to purchase the ship's stores for her voyage; to procure cargoes on freight: to settle the terms and obtain policies of insurance; [but see what is said in the text,] to receive the amount of the freight, both at home and abroad; to pay the master his salary, and disbursements for ship's use; and finally to make out an account of all these transactions for his employers, the owners of the ship, to whom he is as it were, a steward at land, as the officer bearing that name is on board when the ship is at sea." And see the next note. It is admitted that a joint owner may become, with the assent of the other part-owners, the ship's husband. *Suart v. Welsh*, 4 Myl. & Cr. 305; *Muldon v. Whitlock*, 1 Cowen, 290. But the case may be different, where the directors of a joint stock company, for the purpose of navigation, appoint one of their own body a ship's husband. *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 326 ||

(c) *French v. Backhouse*, 5 Burr. 2727; 4 ante, p. 23; (8).4 || In order to administer the affairs of the ship with unanimity, it is usual to appoint a ship's husband. He may be either a part owner or a stranger, and may be appointed either by writing or by parol. His duties are to see to the proper outfit of the vessel; to have a proper master, mate and crew; to see to the furnishing of provisions and stores; to see to the regularity of all the clearances from the custom house; to settle the contracts; to enter into proper charter parties, or engage the vessel for general freight; to settle for freight and adjust averages with the merchant; to preserve proper certificates and documents in case of future disputes with insurers or freighters, and to keep regular books of the ship. But without special powers, he cannot borrow money generally for the use of the ship, though he may settle accounts and grant bills for them, which will form debts against the concern. Nor can he, without special authority, insure the ship. *Collyer on Partnership*, 810; *Story on Partnership*, § 418, and n. *ibid*; 3 *Kent's Comm.* 157; 3 *Stephens*, N. P. 2530; *Muldon v. Whitlock*, 1 Cowen, 308; *Bell v. Humphries*, 2 Starkie, 286. The ship's husband will be entitled, on the failure of the owners, to claim for the balance of his advances and commission; to claim for bills and engagements in his own name for the price of repairs, furnishing &c., and to hold a lien for his security and indemnification, over the documents and warrants of the ship, and over the freight recovered, or

2. Though, as has been mentioned, urgent danger, without means of referring for instructions to the principal,

which he has been employed to recover. 3 Stephens, N. P. 2530, citing 1 Bell's Comm. 411.

It has been stated that a part-owner may be a ship's husband ; but this position is not without limitation, as where from the nature of the ownership, the part-owner may have an interest hostile to his associates. Thus, the plaintiffs and several other persons agreed to form themselves into a society or partnership for the purpose of building, purchasing, hiring and employing steam and other vessels, to convey and carry goods and passengers in the bay and waters of the province of Bahia, and elsewhere along the coast of Brazil, and to and from such other parts and places as the directors for the time being, of the said society or partnership might see fit, and to charter, hire, hold and possess ships or shares therein for the purposes above mentioned, and for all purposes incident thereto ; and it was agreed that the defendants should be the first directors of the company. By the deed of settlement, made in pursuance of the said agreement, there were to be six directors who were to have the general management of the concerns of the company, who were entitled, collectively, to the annual sum of £650 for their time and trouble. Heathorn was one of the six original directors, who appointed him ship's husband. A bill was filed by the plaintiffs on behalf of themselves and other shareholders, against Heathorn, and the other directors, for the purpose of obtaining relief against various acts of misconduct alleged to have been committed by Heathorn, in collusion with, or by the permission of the other defendants as his co-directors. It appeared from the admissions of Heathorn, in his answer, that he had charged and been allowed divers sums of money for commissions ; and had retained sums for discounts and deductions on tradesmen's bills, the right to retain which he insisted on as ship's husband. Knight Bruce, V. C. declared that Heathorn was not entitled to the commission which was allowed to him by the board of directors as ship's husband or otherwise, and directed an inquiry, by the master, as to what discounts or allowances had been from time to time received by or on the behalf of the defendant Heathorn in the character of ship's husband or agent, &c. The case is instructive in many respects ; and the following extract is made, notwithstanding its length, as affording not only a clear view of the law on the particular point but as bearing upon other analogous subjects. The vice chancellor says : " The main, or only business of this company consisted in acquiring, managing, and working steam vessels. It may have been that a ship's husband was necessary. It is the defendants' case, or the case at least of Mr. Heathorn, that a ship's husband was necessary. This is denied on the part of the plaintiffs, who say that the directors might very well have performed such duty as the management of the vessels required, without the interposition of a ship's husband. On that I give no opinion ; but if a ship's husband

may sometimes justify advances otherwise unauthorized, it is certain that payments merely voluntary and officious

was necessary, it is obvious he would become the responsible servant of the directors, in an onerous office,—that he would become an accounting party to them, and that his conduct, as well as his accounts, however respectable he might be, would require a constant and vigilant superintendence and control. That constant and vigilant superintendence and control, one and all of the directors had, for value, contracted to give ; and what is done ? One of these very directors, becomes himself the person whose conduct and accounts it is his duty to superintend, to check, and to watch : at once, therefore, to put the case at the very lowest, and in a manner most favorable to Mr. Heathorn, paralyzing him as director in this respect, and leaving the company, as far as these important matters were concerned, under the protection of but five, while they believed themselves to be under the protection of six. But it does not rest there. The five remaining directors were placed in the difficult and invidious position of having to check and control the accounts of one of their own body, with whom they were associated on equal terms, in the management of every other part of the affairs of the concern. It has been, nevertheless, with an appearance of seriousness, treated as an arguable question, whether I can allow this gentleman to receive profits, however reasonable in amount, if they had been claimed by another person, which he has made by this employment, in which he ought never to have embarked. If the court were to do so ; if the court were to allow to a person so circumstanced, that which might fairly be allowed to a stranger, it would obviously afford the strongest encouragement to a departure from what is the right and regular course in every similar establishment. A party would take a situation of this nature with the certainty of having a fair remuneration, and with the probable advantage of retaining what was unfair. It is mainly this danger, the danger of the commission of fraud, in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees, and all parties whose characters and responsibilities are similar, (for there is no magic in the word,) induces the court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing, between man and man, in all cases, but especially in those, where one man is trusted by another,) to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced—saying, to the person complaining that he has thus employed his time and skill without remuneration, that he has elected so to treat the matter ; that he has had his reward, for he has had the possibility, nay the probability of retaining to himself that which he never ought to have retained ; that he has been willing to run the risk, and cannot complain if he happens to lose the stake. It is on this principle that Lord Eldon proceeded in the cases so

cannot be claimed by an agent, though intended for the benefit of the principal.(A) Thus where an agent, after parting, by the direction of his principal, with the possession of property in his care and management, advanced money to release it from a seizure which occurred afterwards; this was held to be a voluntary payment, and not recoverable by the agent.(d) ‡ In like manner where brokers acting for the assignee of a bill of lading, after instructions to the contrary, paid, in order to release the cargo, freight which their principal could not have been compelled to pay, they were not allowed to recover back the money so paid, although they had acted as they thought best for the interest of the principal.(1)‡ And it

familiar to us all, of purchases by trustees. It is only an instance of the application of the rule, not the rule itself. If, in the present case, Mr. Heathorn had openly and directly brought forward the matter before the body of shareholders generally, I consider it possible, if not probable, that he would have been allowed to receive, and would now have been entitled to retain, all the sums in question paid for commission. He has not elected to take that open and straight forward course; he has chosen that the matter should be undisclosed and he must abide the inevitable result." *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 326, 341. And see *Card v. Hope*, 2 Barn. & Cr. 661.‡

(A) ‡ This is a principle of general extent. One man cannot make another his debtor without his consent: yet the benefit received by such voluntary or officious payment, is a sufficient consideration to entitle the party making it, to recover upon an express promise of reimbursement. *Jones v. Wilson*, 3 Johns. Rep. 434; *Menderback v. Hopkins*, 8 Johns. Rep. 436; *Beach v. Vandenburg*, 10 Johns. Rep. 361; *Overseers of Walkill v. Overseers of Mamakating*, 14 Johns. Rep. 87; *The Rensselaer Glass Factory v. Reid*, 5 Cowen, 603, post, 111, n. 3.‡

(d) *Edmiston v. Wright*, 1 Campb. 88.

(1) ‡ *Howard v. Tucker*, 1 B. & Ad. 712. The case was this. The bill of lading, signed by the captain, expressed that the freight had been paid in India. The assignee of course took it upon the faith of that statement. It appeared that, in fact, the freight had not been paid, through default of the shipper. The ship owners consequently claimed the freight, and detained the goods till payment, and it was to procure their release that the broker paid it. The court considered that the ship owners were bound by the admission of their agent, the captain, on the bill of lading, and had consequently no claim for freight against the assignee; and this

was *held in a late case, that if the principal re- [*110]
 fuse payment upon a contract made by means of
 the agent, and the agent, not being himself liable, but for
 the sake of his own character, which would be affected by
 the discredit of the principal, choose to pay the money
 himself, he cannot recover it, though the principal might
 himself have been compelled to pay it in the first in-
 stance.(e) However, it would be otherwise, if the agent
 were a guarantee for the fulfilment of the contract by his
 principal. And in the case just referred to it was said,
 that if, by the general usage of the trade, the agent be con-
 sidered as impliedly pledging his own credit, such usage
 may be evidence of a guarantee by him to pay, if his prin-
 cipal refused ; and, by consequence, he might recover from
 the principal what he paid for him under the force of that
 engagement.(f) For this reason, an insurance broker,
 acting under a *del credere* commission, which ren-
 ders him liable at all *events to the assured, is en- [*111]
 titled to be reimbursed by the underwriter the
 amount of sums which he has paid for losses to the assur-
 ed.(g) But if a broker not acting under a *del credere*, but
 an ordinary commission, pay the losses for the underwriter
 which he was under no obligation to do, such payments
 are voluntary, and he is not entitled to have them allow-
 ed.(h)(3)

being so, that the payment by the broker (especially after instructions to
 the contrary) was voluntary, and in his own wrong.†

(e) *Child v. Morley*, 8 T. R. 610.

(f) *Ibid.*

(g) *Grove v. Dubois*, 1 T. R. 112.

(h) *Wilson v. Creighton*, 1 T. R. 113 ; || S. C. 3 Doug. 132 ; *Bell v. Auldjo*, 4 Doug. 48. In the last cited case Buller, J. says ; “ It is pretty clear that one point decided in *Wilson v. Creighton*, was, that brokers have no general authority to pay. If that is so, then there is no particular authority proved here. To bind one man by a payment made by another, there must either be a request before, or an assent after the payment. Otherwise no [any] man behind my back, can make me his debtor.”||

(3) † As the author has more than once asserted that an agent under a *del credere* commission is liable in the first instance, and, at all events, to

[*112] *3. In order, therefore, to entitle an agent to indemnity or allowance for disbursements made

the principal, it becomes necessary to correct the mistake into which he has, in this respect, been led by the often cited case of *Grove v. Dubois*.

It is true that Lord Mansfield in that case says "that a commission *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance." The expression itself is inaccurate, for "the commission *del credere*" is not the engagement, but the consideration for it; and later cases have decided that Lord Mansfield misapprehended altogether the nature of the engagement.

A factor or broker acting under a commission *del credere* is a surety to his principal for the solvency of those with whom the principal deals through his agency. He is in no case, as regards his own employer, himself the principal in any contract which he may make for him, and is liable only in default of those with whom he deals. It follows, therefore, that, before he can be charged, it must be averred in the declaration, and proved at the trial, that the principal debtor has made default. Per Lord Ellenborough, in *Morris v. Cleasby*, 4 M. & S. 574. || A factor who remits a bill to his principal in payment of goods sold on his account, and endorses the bill, does not thereby become personally responsible to his principal, if he receives no consideration for his guaranteeing, and does not expressly undertake to do so. *Sharp v. Emmet*, 5 Wharton's (Penn.) Rep. 288.||

The dictum of Lord Mansfield in *Grove v. Dubois*, though supported by the subsequent cases of *Bize v. Dickason*, 1 T. R. 285, and *Weinholt v. Roberts*, 2 Campb. 586, was soon questioned by the courts, (see *Baker v. Langhorn*, 6 Taunt. 519, and *Cumming v. Forrester*, 1 M. & S. 494,) and at last was, by a solemn decision of the Court of King's Bench in *Morris v. Cleasby*, 4 M. & S. 566, altogether denied. Lord Ellenborough, in delivering the judgment of the court in that case, after citing the remark attributed to Lord Mansfield, continues thus: "Some expressions nearly similar, and probably founded on them, have fallen from other judges in *Houghton v. Matthews*, 3 Bos. & Pull. 489. [His lordship might have included himself in the number of those who had been led into the same misapprehension, 2 Campb. 586.] With all the respect which is due to Lord Mansfield and those judges, we cannot accede to the propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce confusion and uncertainty into the law on this subject." "The principal must always be the debtor, and that whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself liable." || And see ante, 41, n. d. *Peale v. Northcote*, 7 Taunt. 478; *Gall v. Comber*, id. 558; *Hurlbert v. The Pacific Insurance Company*, 2 Sumn. 480.||

*by him, they must in general be such as are [*113] justified by his instructions express or implied,

The proposition therefore in the text, that an agent may claim or set off payments made by him for which he was under a *del credere* obligation to the party to whom he made them, cannot be supported. The question will, in all cases indifferently, be this: Were they payments which the agent was authorized to make either by positive instructions, or a former course of dealing, or recognized usage?—if they were not, they were voluntary and officious, and he will have no right to reimbursement, or to an allowance in account in respect of them. || Ante, 109.|| Indeed, on principle, there seems no reason why, if a man take upon himself to act as the common agent of A. and B., the nature of his obligation to A. should be affected by an agreement between him and B., to which A. is no party. What matters it to A. that the agent has, for a higher rate of commission, entered into an engagement for indemnifying B.?

In practice, the right understanding of this relation is exceedingly important. It will be seen hereafter in what way the contracts of an agent affect the rights of his principal; but it may be stated generally here, that if a factor or broker in the making of a purchase act ostensibly in that character, and not as principal, or if after the purchase, and before any change of circumstances has occurred, affecting the condition of the parties, the principal be disclosed, it is from that moment the buyer, (unless under particular circumstances, which will be noticed hereafter,) and not the broker or factor, who is the debtor to the seller. Payment therefore made to the seller by the agent is, in such cases, voluntary; and although, if the principal were not prejudiced thereby, the court might be astute to detect some implied authority from him to his agent for the making of the payment, yet it is quite clear that wherever either he, or those who have succeeded to his rights, would sustain any detriment thereby, the agent will not be entitled to reimbursement. Thus if the payment be made after the bankruptcy or death of the principal, in which case the seller would be entitled only to share rateably with other creditors according to the assets, the factor or broker cannot be allowed to set off such payments in account, as against the assignees of the bankrupt, or the representatives of the deceased. This position will be found fully established by the cases of *Koster v. Eason*, 2 M. & S. 119; *Morris v. Cleasby*, 4 M. & S. 506, and *Gurney v. Sharpe*, 4 Taunt. 242.

The same principles are equally applicable to the case of an insurance broker. The true relation of an insurance broker to the assured on the one hand, and to the underwriter on the other, is this: he is the agent of the former in effecting the policy, and doing all which is a consequence of it—of the latter in receiving and paying over the premiums. But by the usage of trade, as between the underwriter and himself, he is presumed from the first to have received the premiums from the assured, and is himself personally liable for them as principal debtor to the underwriter. The

[*114] *or sanctioned by the subsequent acquiescence of the principal.(A) Thus, if an agent, employed to

assured therefore, in the ordinary case, has nothing whatever to do with the payment of the premiums to the underwriter. On the other hand, the sum due upon the policy in case of a loss, and the returns of premium where the policy has not attached, are a debt from the underwriter to the assured, and not to the broker. The broker consequently has a right at all times to claim from the assured reimbursement or allowance for premiums, whether actually paid by him or not; *Power v. Butcher*, 10 B. & C. 329; *Marsh. Ina.* 300: 1 Campb. 532; 3 East, 222; 4 Taunt. 246. But he cannot as against the assignees of a bankrupt, or the personal representatives of a deceased underwriter, set off in account losses or returns of premiums paid by him to the assured after the bankruptcy or death, because there he was under no obligation to pay, and his officiousness cannot and ought not to place the assignees or representatives in a worse condition than they would have been in, if such payments had not been made. And it is immaterial whether the loss was adjusted before or after the bankruptcy or death; and equally so, whether the broker acted under a *del credere* to the assured or not.

These latter propositions will be found illustrated and borne out by the cases of *Minett v. Forrester*, 4 Taunt. 541; *Goldschmidt v. Lyon*, ib. 534; *Parker v. Smith*, 16 East, 382; *Houstoun v. Robertson*, 6 Taunt. 448; *Houstoun v. Bordenave*, ib. 451; *Peele v. Northcote*, 7 Taunt. 458; and see *Wilson v. Creighton*, || 1 T. R. 113; S. C. 3 Doug. 132. It is true that, in the case of *Shee v. Clarkson*, 12 East, 507, it was decided, that the broker, being the common agent of the assured and of the underwriter, might, while the premium remained in his hands for the one party, and the policy for the other, after notice of events entitling the assured to a return of premium, and before a determination of his agency by the underwriter, deduct such return, and pay over the difference only to the underwriter. But in *Minett v. Forrester*, Mansfield, C. J. puts that decision expressly on the ground, that, by the previous course of dealing between the broker and the underwriter, it might be inferred that the former was specially authorized by the latter to make the payment claimed to be deducted. And it is clear that even in such a case an intervening bankruptcy or death, of which he had notice, would operate as a revocation of such special authority, and render it a payment in the broker's own wrong.

(A) || "Such subsequent assent is an adoption of the act of the agent, with a view to reap the benefit flowing from it; and he who receives the advantage and profit of a contract, must assume the risk of the disadvantage and loss which may attend it." *Spencer, C. J. Skinner v. Dayton*, 19 Johns. Rep. 554. And see ante, 31; *Odiorne v. Maxcy*, 13 Mass. Rep. 182; *Forrestier v. Bordman*, 1 Story's Rep. 43; *Lartigue v. Peet*, 5 Robinson's

*purchase goods at a limited price, exceed that [*115] limit, if the principal accept them on his own account, or do not object upon the receipt of them, the agent is entitled to be repaid the price he gave ;(i) but otherwise not. However, where an agent employed to purchase hemp in a foreign market, and limited as to the price, but not limited as to the freight, purchased at a higher than the limited price, in order to save the freight, which was increasing much more than the price of hemp was falling, it was intimated by Lord Hardwicke, that the principal should not be permitted to reject the bargain, being, upon the whole, a gainer.(k)

4. An agent is not justified in embarking the property of his principal in any manner not authorized by the terms of his employment, however beneficial to his principal the prospect may be. Thus, if a factor lend his principal's money without instructions, though for his benefit, § and the money be lost,§ he has no claim to have it allowed in his account,(l) unless the principal, by the receipt of interest,(m) or other mark of approbation, assent to such disposition of his money.(4)

*5. But even in the execution of his appointed [*116] duty, if an agent conduct himself with such unskilfulness as to incur unnecessary expenses, he cannot obtain reimbursement.(A) Thus, an auctioneer, having undertaken to observe the precautions necessary by the statutes 19 Geo. III. c. 56, and 28 Geo. III. c. 37, s. 20, to prevent the duties attaching, if there were no sale, and having

(La.) Rep. 92 ; post, 171 ; *The N. E. Marine Ins. Co. v. De Wolf*, 8 Pick. 63.¶

(i) *Beawes*, 43 ; *Mal.* 82 ; *Wilson v. Cornwall*, 1 Ves. 510 ; *Prince v. Clarke*, ante, p. 31.

(k) *Id. ib.* ante, p. 31, 32.

(l) *Beawes*, 43.

(m) 2 Eq. Ca. Ab. 788 ; *Beaumont v. Boulbee*, 11 Ves. 550.

(4) † Ante, p. 31.†

(A) § *Dodge v. Tileston*, 12 Pick. 332. *Burdon v. Webb*, 2 Esp. N. P. Rep. 527.¶

by a blunder incurred those duties, was held not to be entitled to recover from his employer what he was obliged to pay on that account.⁽ⁿ⁾ So, if an agent, in the selection of goods which he is employed to buy, act with such gross unskilfulness, as to give a high price for a thing of little value, he is not entitled to be allowed more than the worth.^(o)

6. And though in general all advances made by an agent in the proper execution of a regular authority, are to be repaid by his employer, it is with this qualification, that the transaction out of which they arise is *not of an illegal nature*; for no claim can be supported by an agent for advances made in the prosecution of an illegal dealing, ‡ though sanctioned by, or even undertaken at the request of the principal.^{(5)‡}

In an action on a bill of exchange, drawn by *Wilson* on the defendant, and endorsed by the *former [*117] to the plaintiff, it appeared, that the defendant had been engaged in illegal stock-jobbing transactions, in which *Wilson* was employed as his broker, and had paid the differences for him; and that the sums so paid by *Wilson* formed part of the consideration of the bill in question, which was known to the plaintiff at the time he received the bill; Lord Kenyon nonsuited the plaintiff; and, upon a motion to set aside the nonsuit, it was contended, upon the authority of the case of *Petrie v. Hannay*,^(p) that as the broker had actually paid the differences for his employer, the bill in question, which was to secure to him the repayment of what he had advanced, was not vitiated by the original transaction. But the Court^(q) was of a contrary opinion, and refused to set aside the nonsuit.^(q) The same question soon afterwards occurred in the Court of

⁽ⁿ⁾ *Capp v. Topham*, 6 East, 392.

^(o) Roll. Ab. 125, pl. 10.

⁽⁵⁾ *Josephs v. Pebrer*, 3 B. & C. 639, ante, p. 102; || and see ante, 62, 64; *Armstrong v. Toler*, 11 Wheat. 258; ante, 63, n. (a).||

^(p) Post, || 119, n. (t).||

^(q) Lord Kenyon and Mr. J. Ashhurst. *Steers v. Lashley*, 6 T. R. 61.

Chancery upon these circumstances. *Chippendale* employed *Mather*, a broker, to effect an illegal insurance from *Ostend* to the *East Indies* ; and in consideration of the money laid out by *Mather* in effecting that insurance, drew a bill upon *James*, and endorsed it to *Mather*. Upon the bankruptcy of the drawee, who had accepted the bill, a petition was presented by *Mather* to be allowed to prove under his commission ; which, it was *con- [*118] tended, upon the authority of *Faikney v. Reynous*, and *Petrie v. Hannay*,^(r) that he had a right to do. But by the Lord Chancellor: I am perfectly aware of both the cases cited, but I cannot perfectly accede to them. What is called a consent in these cases, is a confederacy to break a positive law. I have often had occasion to think of these cases upon lottery insurances, &c. and it never occurred to me to be possible to state a distinction between them and a case repeatedly adjudged ; if a man be employed to buy smuggled goods, if he pay for the goods, and they come to the hands of his employer, the latter cannot be compelled to repay him. The proof was therefore refused.^(s) Again, in an action brought by the endorsee of a bill of exchange, the facts appeared to be these. The defendant employed a broker to transact stock-jobbing business for him, who paid the differences, and then drew the bill upon the defendant for the amount, which the defendant accepted. The bill was endorsed to the plaintiff after it was due, so that its origin was open to inquiry ;^(A) and Lord Kenyon adhering to his former opinion, a verdict was taken for the defendant, which upon the authority of the same cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, was sought to be set aside ; but the Court *unanimous- [*119] ly approved of the doctrine established by the decision of *Steers v. Lashley*, and refused the rule.^(t)

(r) Post, || 119, n. (t).||

(s) *Ex parte Mather*, 3 Ves. Jun. 373.

(A) || Post, 121, n.||

(t) *Brown v. Turner*, 7 T. R. 631. The case of *Faikney v. Reynous*,

[*120] *A distinction was once laid down as to this point, between transactions which were *mala in*

mentioned in the text, as adduced in support of the contrary doctrine, was as follows. Debt on bond; the defendant praying oyer of the condition, pleaded the act of 7 Geo. II. c. 8, (the Stock-jobbing Act,) and that the plaintiff and one *Richardson* were jointly concerned in certain contracts prohibited by that statute; that the plaintiff, having paid the differences, the bond in question was given by the defendants, to secure the repayment of *Richardson's* moiety, who was also a defendant and co-obligee.

The Court of K. B. however, considering this bond not to be given directly for the differences, but to secure the repayment of a sum lent, out of which a new obligation arose, over-ruled the plea. 4 Burr. 2069. In the subsequent case of *Petrie v. Hannay*, 3 T. R. 418, the circumstances were these: The plaintiffs were executors of one *Keeble*, who, with the defendant and two others, was concerned in illegal stock-jobbing speculations. Having incurred several losses, they came to a settlement with their broker, who had paid the differences. *Keeble* repaid the broker the whole sum advanced by him, except 811*l.* the defendant's share, for which he drew a bill upon the defendant in favor of the broker, which the defendant accepted. This bill not being paid by the defendant, the broker brought an action upon it against the present plaintiffs, and recovered the amount, no defence being made on account of the illegality of the transaction. The present action was brought to reimburse the plaintiffs the sum recovered against them by the broker, and the declaration was for money paid by them to the defendant's use. The Court of King's Bench, against the opinion of Lord Kenyon, thought the plaintiffs entitled to recover, upon the authority of the case of *Faikney v. Reynous*.

But the authority of these two cases, which had been previously questioned by Lord Kenyon, 3 T. R. 421, 6 T. R. 409, and by Lord Loughborough, *Ex parte Mather*, 3 Ves. 373, seems to be further shaken by the following more modern determination; *Mitchell and others, Assignees of Robertson, v. Cockburne, Assignee of Tyler*, 2 H. Bl. 379. The two bankrupts were engaged in an illegal partnership, for the purpose of insuring ships, which was carried on in the name of *Robertson*, who, previous to his bankruptcy, had paid a much larger sum for losses than he had received for premiums. His assignees claimed half this sum from *Tyler*; and the account being referred to an arbitration, the sum of 1636*l.* 13*s.* 6*d.* was awarded to be due to the estate of *Robertson*, for which the action was brought; but the Court of Common Pleas were unanimously of opinion that it could not be sustained. The former cases, however, were not expressly overruled, for it was observed, by Lord C. J. Eyre, that they differed from the present, in being one step removed from the illegal transaction itself. In the case of *Aubert v. Maize*, 2 B. & P. 271, the point again came under discussion, upon the validity of an award, stating a sum to be due from the defendant,

as his moiety of sums paid by the plaintiff, for losses jointly incurred by them upon a partnership insurance of ships. Lord Eldon, C. J. declared his opinion, that the cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, could not be supported without making the Act of Parliament of very little use. And by the unanimous opinion of the Court the award could not be sustained. These cases, therefore, of *Faikney v. Reynous*, and *Petrie v. Hannay*, though not expressly overruled, seem at this day somewhat doubtful. Indeed there was a circumstance in them, upon which considerable stress was laid, that is not found in those just mentioned, viz. the giving a new security for the sums paid; but the cases alluded to in the text, of *Steers v. Lashley*, 6 T. R. 61; *Ex parte Mather*, 3 Ves. 373; and *Brown v. Turner*, 7 T. R. 631; are similar to them in this respect, which, however did not prevent a decision directly contrary to their authority. But see 13 Ves. 320. (See also *Webb v. Brooke*, 3 Taunt. 6; *Ex parte Bell*, 1 Maule & Selw. 751.)

‡ The cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, are certainly not considered good law at this day. ¶ They seem, however, to have been recognized as sound law, by Marshall, C. J. in *Armstrong v. Toler*, 11 Wheat. 258. ¶ The rule to be collected from all the cases is this: that whenever the party seeking to recover appears to the court by proof in an action on simple contract, and by pleading and proof in an action on a specialty, to have been in any respect contaminated with, or even privy to the illegal transaction on which the claim is originally bottomed, his remedy, whether upon the primary consideration, or a security substituted for it, is gone. See, in addition to the cases already cited, *Booth v. Hodgson*, 6 T. R. 409; *Langton v. Hughes*, 1 M. & S. 594; *Cannan v. Bryce*, 3 B. & A. 179; *Amory v. Meryweather*, 2 B. & C. 575. But an innocent indorsee for value of a security given upon an illegal transaction, is not affected by the illegality, unless expressly declared to be so by statute. *Greenland v. Dyer*, Dan. & Lloyd, 147, and see the note. ¶ *The President of the City Bank of New York v. Barnard*, 1 Hall, 70. As in case of usury. *Powell v. Waters*, 8 Cowen, 699. Yet there are circumstances under which the holder of a negotiable instrument, may be bound to show that he came to the possession of it honestly and for a valuable consideration. Post, 233, 238; *Vallett v. Parker*, 6 Wend. 615. ¶ Unless the security were overdue. *Amory v. Meryweather*. ¶ When a negotiable instrument is transferred when *overdue*, it is reduced to the same state as any other *chase in action*, which the assignee must take subject to all defences and equities existing between antecedent parties; with this advantage, however, that the endorsee of a negotiable instrument may maintain an action at law upon it, in his own name, which the assignee of a bond &c., cannot do. The circumstance, that a bill or note is overdue, at the time of its transfer, is such a circumstance of suspicion as should put the party upon inquiry, and thus lets in the equitable doctrine as to constructive notice. Yet it is *prima facie* evidence of a debt, and it lies upon the defendant to impeach its validity. A bill, note, or check payable on demand, is placed on the same footing, when demand of payment has not

[*121] **se*, and those which were only *mala prohibita* ;(*u*)
but such a distinction has been disclaimed by later
opinions.(*w*)(6)

7. No allowance is due, either at law(*x*) or in equity,(*y*)
to factors, bankers, and other agents, for payments or ad-
vances made to their principal, or by their [*qu.* his] order,
after notice of an act of bankruptcy committed by him.
Therefore a banker, who pays the drafts of a person who
has money in his hands, knowing him to have committed
an act of bankruptcy, though before any docket
[*122] struck, is liable to be called upon again for *it by
the assignees.(*z*) But payments to the bankrupt,
without such knowledge, are protected(*a*) by the statute 1
Jac. I. c. 15, s. 14, which enacts, "that no debtor of the
bankrupt shall be endangered for the payment of his debt
truly and *bona fide* to the bankrupt, before such time as he

been made within a reasonable time. *Hendricks v. Judah*, 1 Johns. Rep. 319 ; *Lansing v. Gaine*, 2 Johns. Rep. 300 ; *Sandford v. Mickles*, 4 Johns. Rep. 224 ; *O'Callaghan v. Sawyer*, 5 Johns. Rep. 118 ; *Losse v. Dunkin*, 7 Johns. Rep. 70 ; *Lansing v. Lansing*, 8 Johns. Rep. 454 ; *Loomis v. Pulver*, 9 Johns. Rep. 244. *Furman v. Haskin*, 2 Caines' Rep. 369 ; *Judd v. Seaver*, 8 Paige, 552 ; *Cromwell v. Arrott*, 1 Serg. & Rawle, 180. *Dean v. Hewitt*, 5 Wend. 257. But the endorsement of a note *before* its date, is no ground of suspicion, so as to put the endorsee upon inquiry, and subject him to equities existing between the original parties. *Brewster v. McCardell*, 8 Wend. 378. How far an endorsee of a bill or note, not yet due, is affected by equities between preceding parties. See *Swift v. Tyson*, 16 Peters, 1. When the consideration of the transfer is a pre-existing debt from the endorser to the endorsee, the latter is deemed a purchaser for a valuable consideration. *Ibid.*||

(*u*) Per Lord Mansfield, 4 Burr. 2069 ; and *Ashhurst*, J. 3 T. R. 422.

(*w*) 1 B. & P. 298 ; 2 B. & P. 373.

(6) † See ante, p. 64, note (*c*).†

(*x*) *Vernon v. Hankey*, 2 T. R. 113.

(*y*) 3 Br. C. C. 314.

(*z*) 2 T. R. 113. The assignees may elect either to proceed against the agent, or against the person to whom the money is paid, thereby adopting the agency, and considering the money as paid, thereby adopting the agency, and considering the money as paid to their use. *Vernon v. Hanson*, 2 T. R. 287 ; † *Hammersly v. Purling*, 3 Ves. 757.† As to the consequence of the latter mode of proceeding, see post, || 172, 174.||

(*a*) 2 T. R. 122.

shall understand or know that he is become a bankrupt.”(7) Upon the construction of this clause it was held; where goods had been consigned to a factor and sold by him, and the money received before an act of bankruptcy, upon the faith of which he accepted bills after act of bankruptcy, but before notice; that the payment of those acceptances after notice was a payment protected by the act, and for which he had a right to be allowed in his account.(b) So if, instead of acceptances goods had been given at the time in exchange, that would have been deemed a payment within the statute.(c) But where a factor *advanced money upon consignments made [*123] after an act of bankruptcy, he was deemed liable to the assignees for the whole of the proceeds, without deducting the amount of the money advanced, for which he was obliged to come in with the rest of the creditors.(d)(8) This was before the statute 46 Geo. III. c. 135. But now by that statute all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt, *bona fide* made or entered into more than two calendar months before the date of a commission, are, notwithstanding any prior act of bankruptcy made good and effectual in like manner as if no such prior act of bankruptcy had been committed, provided the person so dealing with such bankrupt had not, at the time of such payment, &c. any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.(e)(9)

(7) † Now forming part of the 82d section of the new Bankrupt Act, 6 Geo. IV. c. 16. See post, note (9).†

(b) *Wilkins v. Casey*, 7 T. R. 711. † And see *Bennett v. Spackman*, 1 Carr. 274, S. P., and *Sowerby v. Brooks*, 4 B. & A. 525.†

(c) Per Lord Kenyon, *id. ib.*

(d) *Copeland v. Stein*, 8 T. R. 204.

(8) † This was clearly not a payment, but a loan.†

(e) By section 3, a docket struck is declared to have the effect of notice; but this is repealed by 49 Geo. III. c. 121, s. 1.

(9) † This provision forms the 81st section of the recent act, and is in

[*124] *8. Whatever an agent is entitled to deduct from the demand of his principal for advances or dis-

these words, " And be it enacted, That all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bona fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing or transaction, or at the time of executing or levying such execution or attachment, *notice of any prior act of bankruptcy by him committed*: provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment, shall be valid, unless made, entered into, executed or levied more than two calendar months before the issuing the first commission."

The 82d section enacts, " That all payments really and *bona fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bona fide* made, or which shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, *notice of any act of bankruptcy by such bankrupt committed*."

Section 83 makes the issuing of a commission notice of an act of bankruptcy, (supposing one to have been committed,) provided the adjudication of bankruptcy have been notified in the Gazette, and the party to be affected may be reasonably presumed to have seen it. A clause which seems to have been introduced in consequence of the decision of the Court of King's Bench in *Sowerby v. Brooks*, 4 B. & Ald. 525, wherein the issuing of a commission was deemed not to be notice.

It may be necessary to consider the effect of these enactments as regards the factor, banker, or other agent of one who becomes bankrupt.

As to the 81st section.—There seems no reason why a factor or agent

*bursements of any kind, may be given in evidence [*125] in an action brought against him, without plead-

should be excluded from the protection afforded to all *bona fide* dealings and transactions; and therefore it is apprehended that any transfer of property by the agent to the bankrupt, or other transaction of the like kind not strictly falling within the definition of a payment, would, up to a period of two months before the date of the commission, be protected by that clause. See *Shaw v. Harvey*, ante, ¶ 84 n. (2.)

As to the 82d section.—The payment by the bankrupt protected by that clause, is now in terms confined, as it was by the 19 Geo. II. c. 32, to a payment in respect of goods sold, or of a bill of exchange in the usual and ordinary course of trade, but it is apprehended, that, to make it a “*bona fide*” payment, it must be such as is sanctioned by the regular usage of trade. Per Bayley, J. 3 B. & C. 416; 1 R. & M. 265. Under the former statute it was held, that money received by bankers from a customer after a secret act of bankruptcy, in order to provide for bills which they had accepted for his accommodation, and which were not then due, must be refunded to the assignees; *Tamplin v. Diggins*, 2 Campb. 312; and this perhaps, even under the present clause, would scarcely be considered as a *payment*, though, if more than two months before the date of the commission, it might be protected as a *bona fide* transaction by the 81st section. In another case, where, after a secret act of bankruptcy and before a commission, the bankrupt remitted to his bankers a sum of money in repayment of an advance made by them, for the purpose of taking up a bill of the bankrupt, the court held ¶ that ¶ the ¶ bankers were ¶ not protected; *Holroyd v. Whitehead*; 3 Campb. 530; ¶ 8. C. 5 Taunt. 444; 1 Marsh. 128; ¶ but as that decision proceeded on the ground that the payment was not made in respect of a bill of exchange within the meaning of the stat. 19 Geo. II. c. 32, it would not apply to the present clause, and such payment would no doubt be valid.

As to payments to the bankrupt, it was decided, under the old law, that a payment made by a purchaser, but in anticipation of a consignment of goods which he had ordered of the bankrupt, was not protected; *Bishop v. Crawshay*, 3 B. & C. 415; and see *Sanderson v. Gregg*, 3 Stark. 72; *Cash v. Young*, 2 B. & C. 413; and *Hill v. Farnell*, Dan. & Lloyd, 264. But as the judgment rested on the ground that the person who made the payment was not strictly a “*debtor*,” of the bankrupt, as required by 1 Jac. I. c. 15, s. 14, it would not, as it should seem, govern a similar case occurring since the new act. It will be observed, that in both sections there is a material alteration in respect of the *notice* by which the transaction is to be affected. Under the former statutes it was liable to be overreached if the party had notice either of a prior act of bankruptcy, or *insolvency* or *stoppage of payment*. At present it can be affected only by notice of a prior act of bankruptcy.

[*126] *ing it, or giving notice of set-off. For the balance only is the debt; and, upon the principal's bankruptcy, the balance only can be claimed by the assignees. (f) (10)

[*127]

*SECTION 3.

1. Besides the means of indemnity which all agents have by action or set-off, the law allows to factors the additional security of a lien upon property in their hands. (A) A lien has been defined to be a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. (a) It is not, therefore, founded in property, but is an equitable right to retain the property of another; (b) and

For other points, not immediately connected with our subject, on the construction of these clauses generally, see Deacon's Law and Practice of Bankruptcy, vol. i. pp. 674, et seq.†

(f) *Dale v. Sollett*, 4 Burr. 2133. In *Dinwiddie v. Bailey*, 6 Ves. 142, the plaintiff, an insurance broker, filed a bill, praying that an account might be taken of money received by himself on account of defendant and of money due to him for commission, postage, premiums, and an injunction to stay proceedings at law. The bill was demurred to, and the demurrer allowed, because the charges were merely ground of set-off, or such as the plaintiff might prove in defence to the action at law; and see 1 T. R. 102. † See ante, p. 59, (m).†

(10) † However it is advisable, for the most part, to give notice of set-off.†

(A) ‖ And such lien does not preclude the factor from availing himself of his personal remedy against his principal, unless there intervene an express agreement, or circumstances from which a waiver of the principal's responsibility, by the factor, may be inferred. *Burrill v. Phillips*, 1 Gallison, 360. *Peisch v. Dickson*, 1 Mason, 9. Perhaps, the agent having two sources of recovery for his debt, ought in the first instance, to exhaust the lien he has upon the subject of his agency, before making a personal charge upon his principal. *Corlies v. Cumming*, 6 Cowen, 184.‖

(a) 2 East, 235, per Lord Ellenborough, C. J. ‖ But no lien can arise out of an illegal transaction. *Ferguson v. Norman*, 5 Bing. N. C. 76.‖

(b) Per Buller, J. 6 East, 20, *in notis*.

has been pronounced to be for the convenience of commerce, and on the side of natural justice.(c)

Lien is either *particular* or *general*.(d) A particular lien is the right to retain the thing itself, in respect of which the claim arises.(e) A general lien is a right to hold, not only for demands specifically arising out of the thing retained, but for the general balance of accounts, ‡ in respect of dealings of the like nature.‡ The first is a right, recognized by the common law, with some exceptions,(f) to keep possession of that upon which a man has expended his labor or money, till his demand be satisfied.(f) But

(c) *Kirkman v. Shawcross*, 6 T. R. 19 ; *Green v. Farmer*, 4 Burr. 2220.

(d) 3 B. & P. 494.

(e) 4 Burr. 2214, 2223 ; 1 Atk. 236 ; 7 East, 230.

(f) *Ex parte Deeze*, 1 Atk. 228 ; but see *Wilkins v. Carmichael*, Doug. 100 ; *Abbot*, 124, as to ships. ¶ *Moore v. Hitchcock*, 4 Wend. 292. "The right of lien has always been admitted, where the party was bound by law [as in the case of an inn-keeper,] to receive the goods ; and in modern times the right has been extended so far, that it may now be laid down as a general rule, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen and laborers as receive property for the purpose of repairing, or otherwise improving its condition. But the rule does not extend to a livery stable keeper, for the reason that he only keeps the horse, without imparting any new value to the animal. And besides, he does not come within the policy of the law, which gives the lien for the benefit of trade. Upon the same reasons the agister or farmer, who pastures the horses or cattle of another, has no lien for their keeping, unless there be a special agreement to that effect." *Bronson, J. Grinnell v. Cook*, 3 Hill, 491. But if a horse is delivered to a livery stable keeper for the purpose of training, he has a lien for the keeping and exercise of it. *Best, C. J. Bevan v. Waters*, 3 Carr. & P. 520. The lien of an innkeeper attaches only to the property of a guest. *Binns v. Pigot*, 9 Carr. & P. 208 ; *Grinnell v. Cook*, ubi supra. In a case in which stereotype and other plates were delivered to a printer, for the purpose of being printed from, and he refused to restore them on the ground of his lien for the balance of his demand for printing, whereupon an action of trover was brought against him, *Tindal, C. J.* in summing up to the jury, said : "This is not the case of a lien claimed by a person who has bestowed labor, or expended money upon an article, and who may detain it till he is paid. Every body knows, that, by the common law, a man may detain the commodity on which he has bestowed labor or money. But this is a

[*128] the latter, "being an extension of the general

claim of a larger lien, and those who seek to establish such a lien must show a course of dealing so general and uniform, that persons must be supposed to form their contracts tacitly, on the understanding, that there is such an usage. And it is for you to say, whether in this case, any such uniform usage has been proved to your satisfaction." The jury found against the claim of lien. *Bleaden v. Hancock*, 4 Carr. & P. 152. In this instance, the printer bestowed no labor upon the plates; but if the owner of the plates had furnished him the paper upon which to print, he would clearly have had a specific lien on the impressions. All such specific liens, being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases. *Scarfe v. Morgan*, 4 Mees. & Welsb. 283. But a lien is a personal privilege, of which none but the party entitled to it, can avail himself as a defence to an action by the owner of the goods. Parker, C. J. says: "The lien of a factor does not dispossess the owner, until the right is exerted by the factor. It is a privilege which he may avail himself of, or not, as he pleases. It continues only while the factor himself has the possession, and, therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued notwithstanding the lien. None but the factor himself can set up this privilege against the owner. It is a personal privilege of the factor, and cannot be transferred; nor can the question upon it arise between any but the principal and factor." *Holly v. Huggefurd*, 8 Pick. 73, 77.

A ship owner, clearly, (and upon the same principle a common carrier) has a lien upon goods laden on board of his ship, for the freight; but where the owner has chartered the vessel, for a voyage or for a period of time, to another person, who under the terms of the charter party must in the particular case, be regarded as the owner *pro hac vice*, he has no lien upon the goods laden on board for the amount stipulated to be paid by the hirer. The hirer who has thus become the temporary owner of the ship, alone has a lien for freight upon the goods of third persons, which he may choose to receive on board; for, to create a lien, there must be either an actual or constructive possession; and of this the general owner of the ship, having divested himself for a time, he must seek his remedy against the hirer under the covenants in the charter party. *Clarkson v. Edes*, 4 Cowen, 470; *Lander v. Clark*, 1 Hall, 355, 359, 375; *Hutton v. Bragg*, 7 Taunt. 14. As to the general doctrine in regard to lien, see further *Jarvis v. Rogers*, 15 Mass. Rep. 389, [in which case it would have been satisfactory if the reporter had taken the trouble to inform us, what was the precise judgment rendered by the court.] *Ex parte Foster*, 2 Story's Rep. 131, 144.

right,(g) is only to be established either by express contract, or by that which operates as evidence of a contract,(h) the usage of trade,(i) or previous dealings between the same parties on the footing of such a right.(k)(1)

(g) 3 B. & P. 494.

(h) *Kirkman v. Shawcross*, 6 T. R. 14.

(i) *Rushforth v. Hadfield*, 7 East, 224.

(k) *Ex parte Hockenden*, 1 Atk. 236 ; 4 Burr. 2221 ; 6 East, 28. || *Bennett v. Johnson*, 2 Chitty's Rep. 455 ; S. C. 3 Doug. 387 ; *Fergusson v. Norman*, 5 Bing. N. C. 76 ; *Cumpston v. Haigh*, 2 Bing. N. C. 449 ; *Simond v. Hibbert*, 1 Russ. & M. 719 ; *Jarvis v. Rogers*, 15 Mass. Rep. 394, 414 ; *Bleaden v. Hancock*, ante, 127, n. (f). A wharfinger at Hull claimed a general lien for wharfage, laborage, (comprising landing, weighing and delivery,) and warehouse rent. The claim for wharfage was admitted, but as to the residue, upon a case stating that in Hull, such claim had in a great majority of instances been acquiesced in, but in others had been rejected, and that the right had long been, and still was, a disputed point there ; it was held that the claim could not be supported : and Bayley J, with whom the other judges concurred says ; " The *onus* of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent, that a party contracting with a wharfinger must be supposed conusant of it, then he will be bound by the terms of that usage. But then, it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right for general lien for any thing beyond the mere wharfage. An attempt has been made to draw a distinction between the claim for laborage and that for warehouse rent, but the right to either arises out of an express or implied contract, and the case states that the claim to both those items is a point in dispute at Hull. In the face of such a statement, it is impossible to infer that the bankrupt landed his goods at the defendant's wharf upon the terms of giving a general lien in respect of those demands, and waiving the dispute. Many of the instances of acquiescence may have proceeded upon the smallness of the demand, a desire to avoid litigation, or to have immediate possession of the goods, and this greatly diminishes the effect of them." *Holderness v. Collinson*, 7 Barn. & Cress. 212. As to the particular lien of the wharfinger, in the above case, for wharfage, it is a very simple case. A wharfinger also has a lien on the vessel for his wharfage. *Johnson v. The McDonough*, 1 Gilpin, 101 ||

(1) † And the right not being favored by the courts, strict and cogent proof is required to establish it † || *Bleaden v. Hancock*, 4 Carr. & Payne, 152. ||

2. It would obviously be detrimental to the free course of trade, if factors, who are employed for the facility of merchandize, could not part with the possession of property in their hands, without parting with their best security for the advances necessarily made by them upon that property, which would be the consequence, if they had only a particular lien. Whether for this reason or not, it is, however, now fully settled that a factor has a lien upon each portion of goods in his possession, for his general balance,(A) as well as for charges arising upon those particular goods. This right seems first to have received the sanction of legal authority in the case of *Kruger v. Wilcox*,(I) in the year 1754, since which time it has never been controverted, though before it had been considered [*129] as dubious,(m) but is now *received as a known principle of law, too clear to be disputed.(n) And

(A) || Including responsibilities incurred in the execution of his agencies. *Knapp v. Alvord*, 10 Paige, 205.||

(I) Ambl. 252.

(m) *Chapman v. Darby*, 2 Vern. 117; per Lord Mansfield, 4 Burr. 2218. It is stated by Beawes, (2d ed.) 43, that if a factor having goods in his hands, accept bills drawn by the principal, and afterwards the principal breaks, it has been conceived that he must answer the bill notwithstanding, and come in a creditor for so much as he was enforced, by reason of his acceptance, to pay; but puts a quære if equity may not relieve in such cases. In the case of *Hereford v. Powell*, 1695, Comb. 349, Lord Holt distinguishes between the case of a factor having money in his hands, in which case he may detain, and cannot bring an action, unless the principal refuse to account, and his having laid it out by direction in particular goods, in which case he cannot detain, and may therefore bring an action *quod nota*, says the reporter. In *Chapman v. Darby*, 2 Vern. 127, anno 1689, it was held that a factor, whose principal died indebted by specialty more than the worth of his assets, could not detain goods in his hands. † But this decision would not now be considered good law.† || Acc. Story on Agency, § 378. The factor had a power coupled with an interest.||

(n) 6 T. R. 262; 6 East, 23, note; *Man v. Shifner*, 2 East, 529; 1 Burr. 494; 1 Bl. Rep. 102; 2 Burr. 937. || The lien applies not only for the amount of money actually disbursed, for the necessary use of the property in hand, and for acceptances actually paid, but for the amount of outstanding acceptances not then due. *Bradford v. Kimberley*, 3 Johns. Ch.

though Lord Hardwicke, in his inquiry, seems to have in view only the case of a foreign factor, and the author of the *Lex Mercatoria* appears to found the origin of the right upon the factor's residence abroad, yet no doubt is now made that a home factor enjoys the same advantage.^(o) And the lien attaches not only upon goods in specie, but upon the proceeds^(p) and securities received in the course of his business.^(q)^(A)

Rep. 434; *Murray v. Toland*, id. 573; *Hendricks v. Robinson*, 2 Johns. Ch. Rep. 309.||

^(o) 1 B. & P. 498. || "Certainly in general practice it," (i. e. the general lien of a factor,) "is treated as a matter of settled law; and no proof is ever required that such general lien exists, as a matter of fact." Lord Denman, *Barnett v. Brandas*, 6 Mann. & Gran. 665.||

^(p) *Drinkwater v. Goodwin*, Cowp. 251, 255; 2 East, 227; 3 B. & P. 489. || *Bradford v. Kimberley*, 3 Johns. Ch. Rep. 434.||

^(q) Willes, 400.

^(A) || An important question arises as to the extent to which the lien may be specifically exercised—whether it is to be extended over the whole property which is in the hands of the factor, or must be restricted to just so much, or perhaps a little more, than would secure the factor for his advances and liabilities. In *Jolly v. Blanchard*, 1 Wash. C. C. Rep. 255, Washington J. said: "An agent has a lien upon the property of his principal, for any balance due him; but if he is ordered to part with the possession of such property, shall he disobey these orders, and retain goods to a large amount, in order to satisfy an inconsiderable debt? This defendant might have retained such a part of the goods, as would have been sufficient to secure him; or he might have consigned the whole to his friend here, to deliver them up, on being paid what was due." Mr. Justice Story, (Agency, § 372,) intimates more than a doubt as to the correctness of the above decision: and if it be established, cases may be imagined in which it might operate to the destruction of whatever is valuable in the right of lien itself.

An agent employed for the purpose of purchasing goods has a lien upon the goods purchased for his advances in relation to those specific goods, and where there has been a succession of purchases, he may perhaps have a lien upon the last parcels of goods, for moneys due upon the previous transactions. *Bryce v. Brooks*, in error, 26 Wend. 367; reversing S. C. 21 Wend. 14; *Williams v. Littlefield*, 12 Wend. 362; *Stevens v. Robins*, 12 Mass. Rep. 180. It cannot be predicated with certainty of the first cited case, on what ground the final decision rested. The Supreme Court of New York recognized the factor's lien, and further held that he had not waived it by his subsequent conduct. The judgment of the appellate court is con-

‡ But the security must be received in the ordinary course, and not procured by a *misrepresentation]

sistent with the supposition that the majority of the judges of that court were of opinion that no lien existed ; or that they admitted the lien, but deemed it to have been lost. Mr. Chancellor Walworth concurred with the Supreme Court on both points ; observing : “ The principal question presented by this case is, whether a *purchasing agent* has a *general lien* for advances made or liabilities incurred for his principal. Where the purchase is limited to a single article, this question cannot arise, for then, of necessity, the lien is particular. Here, however, there were two transactions, and the doctrine of general lien applies.” One of the two senators who delivered written opinions took both grounds in opposition to the judgment of the Supreme Court. The other (Verplanck) decided in favor of reversal merely on the second ground, (viz. that of waiver,) but coincided with the court below, upon the first, (viz. the abstract question of lien,) which he has ably discussed. He says, (26 Wend. 373,) “ When purchases are made on the strict account of another, the general character of the factor applies alike to him who buys and to him who sells on commission, and is entrusted in either case with the possession and apparent ownership of the property. The advances of funds or of credit, the expenses and commissions arising on purchases, are surely not less entitled, on any reason of natural equity or of commercial advantage, to be protected by a general lien upon the property of his customer, thus coming into the factor’s possession in the course of his business, than those of the merchant who merely sells on commission. Indeed, so far as the risk incurred, and the proportion of the advances to the amount of property or funds in the factor’s hands, give weight to the claim of a general lien, the reasons of equity and mercantile policy, or even necessity, seem stronger in favor of giving special privileges and protection to the purchasing factor, than to him whose business is confined to selling the goods of his principal. Moreover, many of the advances and expenses of the selling factor upon the goods of his employer, are often actually purchases on his account, made necessary by the ordinary course of business, or by accident, for the sale or the security of his commodities. If such advances are allowed to create a general lien, why not the purchases alone, where there are no goods to be sold ? In large and continuous transactions between a general factor and a distant principal, it would be sometimes difficult to distinguish between charges for advances on purchases, and those for many expenses upon goods sold. It would appear, then, to be alike in contradiction to the reason of the thing and the convenience of trade, to establish different legal rules as to transactions and rights so nearly alike in their nature, and differing so little as to any principle of equity or of general legal policy. I find this view of the identity of the legal rights of these two classes of factors, or rather of these two branches of the factor’s business, confirmed by some of the best text writers on commercial law, who extend

the definition of the word *factor*, so as expressly to include the *buying*, as well as the *selling* on commission, and make no distinction whatever in relation to the lien on goods sold and upon those bought." The learned senator refers to the Commentaries of Story, and of Kent; the former of whom in his work on Agency, § 374, resting, as it seems principally upon the case of *Stevens v. Robins*, states this branch of the doctrine very explicitly and concisely. The latter commentator in the edition of his work (the fifth,) published subsequently to the decision in *Bryce v. Brooks*, assents to the position, and relies upon that case as his authority. (2 Kent's Comm. 640, n. (c).)

The case of *Stevens v. Robins*, 12 Mass. Rep. 182, (which may be regarded as somewhat of a leading case,) is stated in a condensed form by the learned senator, of whose abbreviation the editor avails himself. In that case, "the factor had contracted for the purchase of a large quantity of leather for his distant principal, to be delivered and paid for at different times. After a large quantity had been received and the amount of its price drawn for, and paid on general account to the factor, he still remaining liable for the payment for the leather yet to be delivered, it was held that the factor had a general lien entitling him to retain the part so received and remaining in his possession, in order to indemnify himself for his liabilities on the whole contract. There was, indeed, but a single order for purchase, but that was for divers parcels of leather to be delivered and to be paid for at different times. The language of the court, accordingly is this: 'We think that by the general principles of law the factor had a right to keep possession of *all* the goods purchased, until he should be reimbursed and secured against his liabilities.'"

The learned senator then proceeds to address himself to the real point of difficulty in the case, at least as far as general principle is involved. "The right," he says, (p. 375,) "of retaining the property now in dispute, as security for the balance of general advances or liabilities is also denied, because there being here but two orders or transactions, it is maintained that these were separate and distinct, so that no general agency existed and no general balance of account could result. This again is, in my view of the subject, an impolitic narrowing down the rule and usage of commerce, without any positive legal authority, and not in consonance with the principles governing such transactions. The right of general lien is the right of the factor to retain all or any of the goods of his principal coming into his lawful possession in the course of his business as such factor, until the debts which his principal has incurred to him in that course of business are paid: or, as the rule is more briefly expressed by Lord Mansfield: 'A factor to whom a balance is due has a lien upon all the goods of his principal as long as they remain in his possession.' *Godin v. London Assur. Co.* 1 Burr. 494. Now, two transactions of the same nature, where goods are bought or sold on commission, are as sufficient as twenty, to create a balance of debt which may apply as a lien upon goods for advances or charges not incurred upon the very parcel to which the lien is applied. The distinction

tation of the purpose for which it is wanted.(A) Accordingly where a factor of the owner of a ship at a foreign port obtained from the master the certificate of the ship's registry, in order, as he said to pay the tonnage-duties at the custom-house, and without stating that he should claim to hold it as a lien, it was decided that he could not retain it for his general balance against the assignees of the ship-owner.(2)†

Packers also, where they are in the nature of factors, are entitled to the same lien.(r)(B)

between the general and the particular lien is well settled. The latter is the right to retain only on account of charges, expenses or labor bestowed upon the special thing retained as security. The general lien does not depend upon any prolonged and continuous course of business or agency ; but solely upon the indebtedness of the principal to his factor, arising out of that mutual relation and no other, and applies to any property being in the factor's possession in consequence of such agency. Such an indebtedness and such an application of the lien may arise in two transactions, and with respect to two lots of goods, just as distinctly as in the largest course of mutual dealings. The verbal resemblance between a *general agency* and a *general lien*, does not authorize the conclusion that the latter depends exclusively upon the former. Neither the reason of the thing, nor the language of any of the authorities warrants this inference. It is the simple fact of a balance being due the factor upon the account between him and his principal, *in that relation*, which gives the lien. Such is the uniform language of the cases and books. If there be but one transaction and one parcel of goods, then the balance is due only on that one transaction, and the lien can attach only to that parcel of goods. As soon as there is more than one such transaction by sale or purchase, the lien extends to other goods than those on which the debt exclusively arose, and so becomes general. Thus the case of *Stevens v. Robins*, just cited, was not one of a general agency ; it was a single order to purchase leather to be delivered and paid for at different times, but all within a few months, and it was confined to that single article. Yet there the doctrine of a general lien for the liabilities of the purchasing factor was applied by the court."||

(A) || Post, 137. Possession accidentally acquired will not sustain a lien. Parker, C. J. *Jarvis v. Rogers*, 15 Mass. Rep. 414.||

(2) † *Burn v. Brown*, 2 Stark. N. P. C. 272 ;† || post 146, n. (15).||

(r) From the case *Ex parte Deeze*, || 1 Atk. 228 ;|| where a packer was held entitled to retain for a general balance, and from the expression of Lord Hardwicke in *Ex parte Ockenden*, 1 Atk. 237, " that the reason of his

It is understood likewise and has in repeated instances

determination in *Ex parte Deeze* was, that there was evidence of a usage among packers to lend money to clothiers, and the clothes to be for a pledge, not only for the work done, but for the loan likewise ;" it may be conceived that the rule is established generally as to packers, in the same manner as factors ; but from the manner in which Lord Mansfield speaks of that case, 4 Burr. 2222, it would appear, that the decision turned merely upon evidence, that the packer was in reality a sort of factor, and as such entitled to the lien, and that similar proof would be necessary, before a packer, as such, could claim that right. || See as to the cases cited in the foregoing note, the remarks of Gibbs, C. J. in *Rose v. Hart*, 8 Taunt. 499. ||

(s) || It is said, that a wharfinger has a lien for the general balance of his accounts. *Naylor v. Mangles*, 1 Esp. Rep. 109 ; *Spears v. Hartly*, 3 Esp. Rep. 81 ; 2 Kent's Comm. 642 ; ante, 128, n. (k.) Whether a dyer or a fuller has a lien upon goods delivered to him to be dyed, for the general balance of his account, see *Bennett v. Johnson*, 2 Chitty's Rep. 455 ; S. C. 3 Doug. 387 ; *Rose v. Hart*, 8 Taunt 499 ; *Savill v. Barchard*, 4 Esp. Rep. 53. There is certainly nothing in the nature of their employment which would entitle dyers or fullers more than other tradesmen, to a general lien : the lien, therefore, if it exists, must be founded either upon special custom (*Rose v. Hart*, ubi supra,) or upon an express or implied agreement. Chitty says in a note to *Bennett v. Johnson*, (ubi supra.) ; " But dyers, or other traders, may make a stipulation that they will not receive any more goods to be dyed, &c., &c., but on condition that they should respectively have a lien on those goods for their general balance ; and any one who after notice of such stipulation delivers goods to either of these persons, must be taken to have assented to it, and consequently cannot demand goods so delivered to any such dyer &c. without paying the balance of his general account. 6 Term Rep. 14. See also 3 Bos. & Pul. 42, 498 ; 6 East 519." Printers employed to print certain numbers, but not all consecutive numbers, of an entire work, have a lien upon the copies not delivered for their general balance due for printing the whole of the numbers. *Blake v. Nicholson*, 3 Maule & Selw. 167. So, where a large quantity of any particular kind of merchandize, is stored in a warehouse, and portions of it are from time to time delivered out without the storage thereon being paid, the warehouseman, (although he had a right to refuse delivery of any particular portion, until the storage upon that portion had been paid,) has a lien upon the portion left, for the storage of the whole. *Schmidt v. Blood*, 9 Wend. 268. So, where a carrier has goods to be delivered to one person, under a single consignment, he may, although a part has been delivered, retain the residue, until the freight for the whole be paid. Jeremy on Carriers, 70, 72 ; Stephens, N. P. 987.

Whether a common carrier has a lien for a general balance. Mr. Chancellor Kent, considers to be still an open question. 2 Kent's Comm. 637.

been considered as a settled point, that insurance brokers have a lien upon policies for their general balance.(s)

If the right exist, it must depend either on contract or usage ; and if upon usage, strict proof is requisite. " The lien of a carrier extends only for the carriage price of the particular goods on which the hire is due ; and any lien on a general balance must be founded either upon contract or a general usage of trade. Where a carrier seeks to retain for a general balance, both parties must have consented to the alteration ; but usage of trade is evidence of such contract ; and where such usage is general, and has been long established, it is concluded that the parties contracted with reference to it ; but very strict proof is required of such general usage, because it trenches upon the common law right of the subject.—No usage of particular individuals can bind other parties, unless it were so general as to warrant a conclusion, that the consignor contracted with the carrier under such an understanding. And where a consignor has, by the usage of trade, always paid the carriage, the carrier will not be allowed to set up a lien on a general balance, due from the consignee against the former, if the hire on the particular goods carried be tendered him ; for, although the property becomes vested in the consignee immediately on delivery to the carrier, yet it will not operate to defeat the equitable right, which the consignor has of stopping *in transitu*, or charge him with a lien founded upon an agreement between the carrier and third persons : neither can a carrier, who by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, retain them, against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor." 2 Stephens, N. P. 986 and cases there cited.

Where a carrier has given notice that all goods would be subject to a lien, not only for the freight of the particular articles, but also for any balance due from their respective owners ; and goods were sent by the carrier addressed to the order of J. S. who was merely a factor ; it was held that the carrier had not any lien against the real owner for a balance due from J. S. In this case, Abbott, C. J. says : " Where goods are consigned to A. B. or order, the carrier has a right to consider A. B. as the owner of the goods for the purpose of delivery, but not for the collateral purpose of creating a lien on the goods as against the owner, in respect of a general balance due from the consignee ; nor will any prejudice arise to the carrier from our holding this to be the law, for he need not deliver the goods in any case till the price of the carriage for them is paid." *Wright v. Snell*, 5 Barn. & Ald. 350.||

(s) *Whitehead v. Vaughan*, Co. || Bank. Law, || 579 ; *Parker v. Carter*, *id. ib.* ; and see *Castling v. Aubert*, 2 East, 325, 331, 526 ; *Godin v. The London Assur. Co.* 1 Bl. Rep. 102 ; *Hovil v. Pack*, 7 East, 164 ; || post, 150 ; *Spring v. The South Carolina Ins. Co.* 8 Wheat. 268 ; *Moody v. Webster*, 3 Pick. 424 ; *Cranston v. Philadelphia Ins. Co.* 5 Binney, 538. Insurance

*Bankers also are deemed to have a lien upon [*131] bills deposited with them, for a general account.(1)

‡ But if the securities have been deposited as a pledge for a specific sum, the banker cannot claim a lien upon them beyond that sum, though his customer may be indebted to him on the settlement of accounts to a far greater amount.(3)‡

brokers, "stand in the same relation to their employers, as do factors, or any other agents who have been directed to effect an insurance. In this case, they have a lien upon the policies in their hands, and upon the money received by them upon those policies, not only for the amount of their commissions and the premiums of the particular policies, but also for the balance of their general insurance account with their employers." 2 Liv. Agency, 79. But, "the general lien of an insurance broker will not extend further than to cover the general balance of his insurance account: if therefore his employer be indebted to him on account of any other business foreign to that of effecting policies of insurance, this debt will not be within the custom which gives him a general lien, and he will not be allowed to retain the policy as a security for it." Ibid. 80. "If, at the time of making the insurance, the broker knew, or had reason to believe, that the insurance was not for the benefit of the person who gave the order, and that such person was acting merely as agent for another person, he will have a lien only for the amount of the premium and commissions upon the particular policy, and cannot retain it for the general balance due to him from his employer, although the insurance was in the name of that person." Ibid. 92; *Foster v. Hoyt*, 2 Johns. Cas. 327; post, 150.¶

(1) *Davis v. Bowsher*, 5 T. R. 488; *Bolton v. Puller*, per Eyre, C. J. 1 B. & P. 546; *Giles v. Perkins*, 9 East, 14.

(3) ‡ *Vanderzee v. Willis*, 3 Bro. C. C. 21.‡ ¶ In 1 Stephens, N. P. 914, the rule is well stated as follows; "Where a banker advances money to a customer upon the general account between them, he has a lien for the amount of his balance upon all securities belonging to such person, which he might happen to have in his hands; but if a banker make an advance upon the specific security of any particular bill, he thereby elects to abandon his general lien, and to resort to that security alone, and therefore cannot justify the retaining of any other securities to provide for the possible event of that one bill being dishonored." The case of *Bolland v. Bygrave*, Ryan & Moody, 271, applies to the first branch of the above proposition. In that case it appears that M. C. & Co. bankrupts, of whom the plaintiffs were the assignees, had discounted bills for one T. to a large amount, which were still unpaid; and that they had also accepted a bill for his accommodation to a large amount not then due. Abbott, C. J. says, "I think that a banker, who stands in this relation to a customer,

[Neither of course has a banker a lien for his general balance, on muniments casually left in his banking house, after he has refused to advance money on them, as a security.(4) In cases, however, where the banker has such a lien, his assignees may, in the event of his bankruptcy, sue the parties to the securities, deposited with him, and recover from them the balance due to the banker by his customer.(5)]

‡ And Lord Ellenborough has held, that a banker may be considered as holder for value of bills deposited with him as a collateral security, when his acceptances for his customer exceed the cash balance ; and further, that he may put them in suit against the acceptors, though the customer may have received the money from the drawers.(6)(A)‡

has a lien upon any securities of that customer which may, for any purpose, be placed in his hands, and he has a right to retain them to counter-vail the liabilities he has so incurred on this behalf, till those liabilities have ceased." But, clearly, where a security is deposited for a special and specific object, it cannot authorize its detention, further than is necessary to effectuate the object ; and if that fail, the security must be returned. *Randel v. Brown*, 2 Howard, 406 ; *Mountford v. Scott*, Turn. & Russ. 274 ; *Bowen v. Fox*, 10 Barn. & Cr. 41.||

(4) [*Lucas v. Dorian*, 7 Taunt. 278.] || " I apprehend it has never been held, that if deeds are carried to a man for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of moneys theretofore advanced. Such a decision would carry the doctrine upon mortgages by deposit of deeds, further than it has ever yet been carried." Lord Eldon, *Mountford v. Scott*, Turn. & Russ. 280.||

(5) [*Scott v. Franklin*, 15 East, 428.]

(6) ‡ *Bosanquet v. Dudman*, 1 Stark. N. P. C. 1.‡

(A) || An attorney or solicitor has also a lien for a general balance of account arising out of his professional business, (see ante, 130, n. s.) not only on the papers of his client, but on the moneys which he has collected for him. The material points in relation to the lien of an attorney at law (and the same rules apply essentially to a solicitor in equity) were briefly stated by the editor in his *Practice of the Supreme Court of New York*, (a work which he is happy to say was received by the profession with as much, if not more favor than it deserved, and for the want of a second edition of which he is not responsible,) as follows : " To assist the attorney in recovering his costs, he has a lien for the amount of his bill, upon the deeds pa-

*3. In examining the effect of this right, as it [*132] affects the parties, three points are to be consider-

pers and writings of his client, which come to his hands in the course of his professional employment, although his demand does not arise from services in relation to those papers; and until his bill be paid, the court will not order them to be delivered up, nor can an action of trover or detinue be maintained for them. But his lien is only commensurate with the right which the party delivering the papers has in them; and, therefore, when the delivery is unauthorized, the attorney cannot detain them.

“An attorney has also a lien [both on a judgment and] on the money recovered by his client, for his bill of costs. If the money come to his hands, he may retain it to the amount of his bill; he may stop it *in transitu*, if he can lay hold of it; and by application to the court, may prevent it from being paid over, until his demand be satisfied. So, if the defendant pay to the plaintiff the debt and costs, after notice from the attorney of the plaintiff not to do so, he pays the costs in his own wrong, and is liable to pay them over again to the attorney. But where the parties *bona fide*, and without intention to defraud the attorney, settle or compromise the debt and costs, he cannot proceed against the opposite party to obtain his costs. In the case of a collusive settlement of the cause, the attorney may proceed in the suit for the mere purpose of obtaining his costs; though it has been held, (*Graves v. Eades*, 5 Taunt. 429,) that where a suit was compromised after execution issued, the attorney was not warranted in issuing a second execution without a previous application to the court.” 1 Durl. Pract. 77, 78, and cases there cited. 2 Kent’s Comm. 640, 641; 1 Hoff. Ch. Pract. 34, 35; *St. John v. Dieffendorf*, 12 Wend. 261; *Martin v. Hawks*, 15 Johns. Rep. 405; *Power v. Kent*, 1 Cowen, 172; *Bradt v. Koon*, 4 Cowen, 416; *Clutton v. Pardon*, Turn. & Russ. 304; *In the matter of Rice*, 2 Keen, 181; *Murphy v. Archdall*, Sausse & Sc. 634; *Warburton v. Edge*, 9 Sim. 508; 1 Sim. & Stu. (Am. ed.) 457, n. 1. “I cannot see” Lord Cottenham says, “how there can be any sound distinction between the case of a solicitor claiming a lien on the papers of his client, and the case of any other creditor who holds a security for his debt. It was suggested at the bar, that the existence of a special contract could make a difference; but there is, in fact, no ground for such a distinction. Liens existing by the custom of trade, or the practice of a profession are equivalent to contracts; and I know of no distinction in the law of lien, between that of a solicitor, and that of any other party.” *Richards v. Platel*, Cr. & Ph. 458. And see *Steelman v. Webb*, 4 Myl. & Cr. 351.

An attorney, or solicitor, who obtains possession of papers, or moneys of his client, in a character distinct from that of attorney or solicitor, has no lien upon them for claims arising from his professional capacity; but when obtained in that capacity, it is not necessary that the claim should have arisen out of the particular cause in which the papers were deposited. *Ex*

ed : first, in respect of what claims the right exists ; secondly, by what circumstances it may be prevented from attaching, or lost after it has attached ; thirdly, how it is taken advantage of.

First, The debt, in respect of which a lien is claimed by a factor or other agent, must be due to him in his own right, and not as agent for another person. Thus, in a case where *Matthews & Co.* as brokers for G. and D. had sold goods to one *Jackson* upon credit, who afterwards commit-

parte Nesbit, 2 Sch. & Lefr. 279 ; *Champernown v. Scott*, 6 Madd. Rep. 93 ; 1 Hoff. Ch. Pract. 35 ; 2 Barb. Ch. Pract. 207 ; *Wickens v. Townsend*, 1 Russ. & M. 361 ; *Boxon v. Bolland*, 4 Myl. & Cr. 354. It has been held, in several instances, however, that a solicitor's lien upon a fund paid into court, is only for the costs of the suit in which it was paid in. *Lann v. Church*, 4 Madd. Rep. 391 ; *Boxon v. Bolland*, ubi supra ; *Perkins v. Bradley*, 1 Hare, 231 ; *Hall v. Laver*, id. 571, 577. And see *Worrall v. Johnson*, 2 Jac. & Walk. 34.

The attorney's or solicitor's lien for his costs does not affect the equitable right of set-off between the parties. The lien extends only to the clear balance resulting from the equity between the parties. *The Mohawk Bank v. Burrows*, 6 Johns. Ch. Rep. 317 ; *Bawtree v. Watson*, 3 Myl. & Cr. 713 ; *Dunkin v. Vandenberg*, 1 Paige, 624 ; *Porter v. Lane*, 8 Johns. Rep. 357 ; *Ross v. Dole*, 13 Johns. Rep. 306. But the attorney's or solicitor's lien for costs recovered, will not be suspended, until an unliquidated claim of the opposite party can be ascertained, and a balance finally struck between the parties. *The Mohawk Bank v. Burrows*, ubi supra. A decree or judgment arising upon a matter distinct from that in litigation, cannot be set off to the prejudice of the solicitor's lien. *Dunkin v. Vandenberg*, ubi supra.

The present note in reference to this topic could easily have been extended to a much greater length ; but even as far as it has gone, it may perhaps be considered as intrenching too much upon the peculiar province of books of practice at common law or in equity.

An accountant has no lien upon a paper left with him. Thus, where an accountant had been professionally employed in the affairs of a bankruptcy, and the certificate had been left in his hands for the purpose of procuring the Lord Chancellor's signature, and he refused to give it up, the Lord Chancellor (Lyndhurst) made an order to deliver it up, "observing, that unless there was some very special agreement, which does not appear to exist in this case, an accountant could have no right to retain a bankrupt's certificate in security for his bill of costs, which must be recovered in the ordinary way by an action." *Anon.* 1 Russ. & M. 330.¶

ted to them some goods of his own to sell, as his brokers, it became a question upon the insolvency of *Jackson*, whether the brokers had any lien upon the latter goods for the price of the former, (there being a balance due to him from G. and D.) which was decided in the negative.(u)

It must also be a debt due from the person for whose benefit he is acting. Thus, where an agreement was made between the owner of goods and a creditor, that they should be sold to pay the creditor, and the factor of the owner was fixed upon to sell them, with knowledge of the agreement, it was held, that the factor had no lien for another debt due to him by the owner of the goods.(w)

Further, if an agent unnecessarily make himself *liable to others for work done to his employer's [*133] property, he does not acquire a right to retain the property for the amount of what he pays under such liability. As if a servant deliver cloth to a tailor, to make into clothes, the tailor indeed will have a lien on the cloth for his work; but though the servant pay the tailor his charge, that will not give the servant a lien on the clothes.(x)

(u) *Houghton v. Matthews*, 3 B. & P. 485.

(w) *Weymouth v. Boyer*, 1 Ves. Jun. 416. || *Foster v. Hoyt*, 2 Johns. Cas. 327; ante, 130, n. (s).||

(x) 9 East, 433. It is determined that the master of a ship has no lien upon it for money expended in the payment of demands for repairs, &c. either at home or abroad. *Hussey v. Christie*, 9 East, 426; *Abbott*, 124. See 13 Ves. 594. In the case of *White v. Baring*, 4 Esp. 22, it is said to have been ruled by Lord Kenyon, at Nisi Prius, that a master has a lien on the *freight*, for debts to which he had made himself liable for stores, whether furnished at home or abroad, does not distinctly appear. A rule for a new trial was granted, but the matter was settled. [The decision, however, has been since overruled by the case of *Smith v. Plummer*, 1 B. & A. 575, in which it was decided that the master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo.] But though at law no lien exists in the captain, under the circumstances above described, yet a court of equity, in considering the demands of different parties upon the money arising from the sale of the ship, has allowed that of the master for disbursements abroad. *Walkingson v. Barnardiston*, 2 P. Wms. 269. † However, this decision also has been

[*134] * [So, where a broker purchasing goods for his principals, without their knowledge, added to the terms of purchase, which the principals had agreed to, a guarantee by himself of their bills, and, after the goods were delivered to the broker, the principals became bankrupt, it was held, that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had any lien on them, for the money he had paid on his guarantee.(7)]

However, if a factor, having become surety for his principal, † with the knowledge and consent of the principal, † has been compelled to pay the debt, he has a right to consider it as part of the general account, for which he is entitled to retain.(y)

In general, the rules are the same with respect to the na-

overruled in a subsequent case of *Husie v. Christie*, 13 Ves. 594, where the like question arising, the Lord Chancellor treated it as a purely legal question, and sent the case to the Court of King's Bench for the opinion of the judges of that Court, who were unanimously of opinion, that although the master might hypothecate the ship for necessary repairs in the course of a foreign voyage, yet he had not himself any lien upon it. 9 East, 426. † A ship at sea was mortgaged by the owner to the plaintiff. The ship having become unseaworthy, it was condemned and sold in a foreign port. The purchaser drew upon a person in England, a bill of exchange for the proceeds, and enclosed and delivered it to the captain. The captain claimed a lien upon, or a right of set-off against the amount of the bill, for disbursements which he had made on account of the ship, and threatened to bring an action against the acceptor for the money due on the bill. The vice chancellor granted an injunction to restrain the action; observing that he considered the bill of exchange as fairly representing the ship, and that the court ought to interfere so as to prevent the money due on the bill, from getting into the hands of the captain. *Lister v. Payn*, 11 Sim. 348. †

(7) [*Gurney v. Sharpe*, 4 Taunt. 242.] † And see ante, p. 111, note (3). †

(y) *Drinkwater v. Goodwin*, Cowp. 251. † The marginal note of that case is incorrect. It states,—that “a factor, who becomes surety for his principal has a lien on the price of goods sold by him for his principal, to the amount of the sum for which he has so become surety;”—but the case itself does not warrant any such doctrine, inasmuch as the claim of the factor then in question, arose, not from his having become surety merely for his principal, but from his having *actually paid* all the money due on the bond into which, as such surety he had entered. *Russ. Fact. & Brokers*, 197, n. (b). †

ture of the claims for which a lien exists, as those which regulate the right of the agent to an allowance in account, which have been already considered.(z)

Though a factor have [has] undoubtedly a lien for the balance of a general account, connected with his employment as factor, it has been a question, whether it is confined to such demands, or whether it may not comprehend all accounts between the parties, as well prior as subsequent to the *commencement of the employ- [*135] ment. In a case already referred to upon another point,(A) the question arose under these circumstances. The defendant *Matthews*, as broker for persons named *Greatham* and *Dixon*, sold to *Jackson* certain logwood, &c. upon credit. Soon after that sale, *Jackson* put into the hands of the defendant other indigo of his own, to sell as his broker, no advance being made by the defendant upon this indigo, nor any debt existing between him and *Jackson*, other than what was due for the goods of *Greatham* and *Dixon*. Indeed the commission to sell the indigo in question was the first time *Jackson* had ever employed the defendant as broker. While the indigo still remained unsold in the defendant's hands, *Jackson* became a bankrupt, upon which his assignees claimed it, and tendered payment of any charges incurred in respect of that article. But the defendant insisted upon a right to retain for the debt due from *Jackson* for the logwood, &c. of *Greatham* and *Dixon*, previously sold to him, as before-mentioned.

The principal point in the case was, whether the defendants could avail themselves of a debt which was not due to them on their own account;(a) but another question was very fully considered, viz. whether the debt, having arisen previous to the employment as agent, could give *the defendants a right to retain upon the [*136] ground of a general lien. Upon this point the

(z) Ante, || 100, et seq.; 115, et seq.||

(A) || *Houghton v. Matthews*, 3 B. & P. 485; ante, 132.||

(a) *Drinkwater v. Goodwin*, Cowp. 251.

Court of *Common Pleas* was not unanimous ; but, according to the opinion of the majority of the judges of that court, a factor or broker has not any general lien in respect of debts, prior to the time at which he begins to be employed in that character. This is agreeable to the opinion of Mr. J. Lawrence in another case,^(b) “ that the doctrine of liens applies only to cases where goods have been delivered, in the nature of a pledge, and that if the persons claiming the lien had never, before the transactions in question, acted as brokers of the party against whom they claimed, it could not be considered that the goods were deposited as a general pledge.” And, indeed, if all debts whatsoever were supposed to be included in a factor’s lien, it might be extended to such as have no reference to trade or mutual dealing ; as, for instance, to a demand for rent,^(c) which seems to be departing very far from any principle upon which the right can be supposed to be founded.⁽⁸⁾

[*137] *† The charges in respect of which the lien is claimed must be such as are warranted by the usual course of dealing, and are necessarily incurred by the agent in the proper discharge of his duty. The expenses of a suit at law, and a reference arising therefrom, have been allowed to constitute such a charge, where it appeared that the proceedings were properly taken by the factor to obtain possession of the goods consigned, which were wrongfully withheld by the master of the ship.^{(9)†}

(b) *Walker v. Birch*, 6 T. R. 258, post, ¶ 142, 147.¶

(c) Per Heath, J., *Houghton v. Matthews*, 3 B. & P. 485.

(8) † There can be little doubt that the lien extends only to the results of transactions which were within the course of dealing of the agent as such agent. See *Olive v. Smith*, 5 Taunt. 56 ; *Weldon v. Gould*, 3 Esp. 268.† ¶ *Jarvis v. Rogers*, 15 Mass. Rep. 396. So, Lord Eldon said in *Mountford v. Scott*, Turn. & Russ. 280, “ I apprehend it has never been held, that if deeds are carried to a man for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of moneys theretofore advanced.”¶

(9) † *Curtis v. Barclay*, 5 B. & C. 141.†

4. The second point to be ascertained is, under what circumstances the lien takes place.

In order to found the lien of a factor, it is necessary that the property upon which it is claimed should have been in his possession; and that it should have come into his possession in good faith, and not by his own fraudulent or illegal act; (A) for if goods, after being consigned to a factor, are stopped *in transitu*, (10) no such right vests in him; and the owner may exercise the power of stopping the goods, so as to prevent the factor gaining any lien upon them, notwithstanding he has accepted bills drawn upon him on the faith of the consignment. This appears from the following *authority. (d) Steine, a [*138] merchant in Scotland, had been in the habit of consigning cargoes to Sandiman and Graham at London, as

(A) ¶ Ante, 129, 130; post, 146, n. (15); *Randel v. Brown*, 2 How. 424; *Wickens v. Townshend*, 1 Russ. & M. 363; *Lempriere v. Pasley*, 2 Term Rep. 455; *Lucas v. Dorien*, 7 Taunt. 278; *Taylor v. Robinson*, 8 Taunt. 648. A factor claiming a lien, is bound to show, affirmatively, a possession of the goods upon which the lien is claimed. See the case last cited. But a constructive possession may be sufficient. *Rice v. Austin*, 17 Mass. Rep. 204; post, 138, n. (d.) And according to Lord Ellenborough, the term *lien* “ imports an authority either to *possess*, or to *retain*.” *Holland's Assignees v. —*, 1 Starkie, 143. The retention of property, after the extinguishment of a lien, becomes a fraudulent possession. *Randel v. Brown*, 2 How. 406; *Jarvis v. Rogers*, 15 Mass. Rep. 389.¶

(10) † This term, “ stoppage in transitu,” has acquired a secondary and technical meaning in the mercantile law, and is confined to the case of an unpaid vendor stopping the goods on their way to an insolvent vendee; it is not therefore applicable, in this sense, to the case of principal and factor.†

(d) *Kinloch v. Craig*, 3 T. R. 119; ¶ *Walter v. Ross*, 2 Wash. C. C. Rep. 287.¶ It has been held, however, that a factor, who is in advance to his principal, has such an interest upon goods consigned to him, upon which he would have a lien if they arrived, as entitles him to recover upon a general policy on goods effected by him for his own security. *Godin v. The London Ins. Co.* 1 Burr. 489, 494; *Flint v. Le Mesurier*, Park, 11; and vide Park, 269, *in notis*, where interest was declared in a policy to be “ on commission of the plaintiff, as consignee of the cargo, valued at 1500*l*. Lord Kenyon expressed a strong opinion that this was a good insurable insurable interest. *Barclay v. Cousins*, 2 East, 544. ¶ That it is a good interest, see *Brisban v. Boyd*, 4 Paige, 17.¶

factors, who from time to time used to accept Steine's bills in confidence of those cargoes. At the time [when] the goods, the subject of the action, were consigned to Sandiman & Co., the latter were under acceptances for 29,000*l.* part of which was for those goods. A bill of lading unendorsed and invoice had been received by them ; but when the ship arrived, on the 21st of February, they had stopped payment, and refused to intermeddle with unloading the cargo, though they had orders from Steine to unload on her arrival. But on the 8th of March they paid some money in part of the freight. About the middle of the same month the goods were demanded of the captain by Sandiman & Co.'s assignees, but refused ; the captain having orders from the assignee of Steine, who had become bankrupt [*139] on the 4th of March, to withhold *them. The bills accepted by Sandiman and Graham had not been paid. An action was brought by their assignees to gain possession of the goods, and a verdict was given in their favor, which was set aside and a new trial granted, the ground of which was declared to be, that though, as between consignor and factor, the latter has a lien upon all consignments, yet the position is to be understood with this restriction, that he has obtained possession of the cargo. Upon the second trial there was a special verdict ; but the Court of King's Bench, without argument, gave judgment for the defendant, and that decision was affirmed in the House of Lords, by the unanimous advice of the judges.(e)

(e) 3 T. R. 783 ; 1 East, 4. But where there was an agreement, that, in consideration of being permitted to draw bills, the drawers should consign goods to the drawees for sale on their account, the latter to receive the usual commission on the sales, and out of the proceeds to indemnify themselves against their acceptances ; it was held, that this agreement did not create the relation of principal and factor, but that the consignees, to whom bills of lading were remitted, were entitled to the goods, though the consignors had become bankrupts before the ship sailed, and their assignees had got possession. *Haille v. Smith*, 1 B. & P. 563. || Where a party consigns goods to another and sends him a letter of advice, and immediately after draws upon the consignee for funds, who accepts the drafts, a jury

So if goods come into the possession of a factor not by the consignment of the owner, but by consignment or de-

are warranted in finding a contract, and that the title to the goods has vested in the consignee, although there be no express agreement to that effect. *Holbrook v. Wight*, 24 Wend. 169.

Where property is at sea, the delivery and endorsement of the bill of lading will confer a constructive possession sufficient to support a lien. *Rice v. Austin*, 17 Mass. Rep. 197. "Formerly indeed," (says Mr. Russell, Fact. & Br. 202, 203; referring to *Kinloch v. Craig*, supra,) "the law was quite the reverse; for it was held, that though the factor might have given acceptances on the faith that consignments would be made to him, still this was a mere executory agreement for the non-performance of which only a right of action accrued, and that no property in the goods was thereby vested in him. On referring, however, to more recent cases on this subject it will be found, that our courts have now changed their views with reference thereto; and it appears that at the present day, a factor's right of lien on goods, the insignia of which only have come to his hands, will depend on the question;—was it the intention of the consignor to vest the property in the consignee, from the moment of delivery to the carrier?—and it is said, that if the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, be established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or shipmaster employed by the consignor, or a third person,—and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough: and that it matters not by what document this is effected; nor is it material whether the person who is to have the property be a factor or not, for such agreement may be made with a factor, as well as with any other individual. Wherever therefore the bill of lading, or other document, operates as evidence of a change of property, the factor will be entitled immediately on receipt thereof, to claim his lien; and on the arrival of the goods he will have a right to insist on their being delivered to him, in order that he may retain them by virtue thereof." *Haille v. Smith*, ubi supra; *Bryans v. Nix*, 4 Mees. & Wels. 775, 791; *Evans v. Nicholl*, 4 Scott, N. R. 43, 53. So, a factor *del credere*, who has made advances upon goods consigned to him for sale, and which have been delivered to a third person to forward, has a lien upon the goods, and may maintain an action against the bailee for non-delivery. *Holbrook v. Wight*, ubi supra.

But where the bill of lading has not been delivered to the consignee, and there is no other evidence of an intention in the consignor to consign the specific property to him, no lien will attach; because, in the absence of evidence of such intention, the consignor will be held entitled to change the destination of the goods, at any time before they come into the actual possession of the consignee. Russ. Fact. & Br. 204, where the case of

livery of the person to whom he has transferred the property in them, (11) the factor can have no lien upon [*140] them for advances *made to the owner. (f) † And where brokers without any direction from their principal, and after an act of bankruptcy committed by him, took into their own possession goods which they had purchased for him, but which, up to that time, had remained in the warehouse of the seller at a rent payable by their principal, it was held that they could || not || by this unauthorized transfer of possession, obtain a lien upon them as against the assignees. (12) †

However, the death of the principal, between the consignment and arrival of the cargo, does not divest the lien

Mitchel v. Ede, 11 Ad. & Ellis, 888, is referred to, in support of the position. In that case, Lord Denman, C. J. delivering the opinion of the court, says: "It now becomes necessary to consider the effect of the bill of lading. This it was contended in argument, was a contract between Mackenzie, the owner of the sugars, of the one part, and the defendants by their alleged agent, the captain, on the other; and by virtue thereof that the property passed absolutely to the defendants, upon the signing of the bill of lading by the captain. We think, however, that this argument proceeds upon a misconstruction of the nature and operation of the bill of lading. As between the owner and shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person to whom it is (*at the time*) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose at any rate before the delivery of the goods themselves, or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B. instead of to A. This therefore being, as we think it is, the true construction of the bill of lading, and its effect, it is, in our opinion, conclusive against the argument that the property in the sugars was vested in the defendants by the captain's signature of it." ||

(11) † As by endorsement and delivery of the bill of lading. †

(f) Per Eyre, C. J. 3 T. R. 787.

(12) † *Taylor v. Robinson*, 2 Moore, 730; || S. C. 8 Taunt. 648; || and see *Nichols v. Clent*, 8 Price, 547. † || But the bankruptcy of the principal does not divest the lien of the factor, which, under the circumstances of the case, was extended to a claim arising subsequently to the bankruptcy. *Ex parte Kensington*, 1 Deac. 58. The factor having funds on which he had a lien was held entitled to apply them to payment of such portion of his debt as accrued after the bankruptcy, and to prove for the balance under the commission. *Ibid.* ||

which a factor may have acquired by the acceptance of bills upon the faith of the consignment.(g)

5. But even where the lien is not prevented in the manner just described, by the exercise of the owner's right to stop them *in transitu*,(13) yet the nature of the contract between the principal and the factor may be such as to exclude the lien which would otherwise exist,(A) and of which the following case affords an instance. Caldwell & Co. deposited a quantity of cotton with Greaves & Co. as brokers; and the object of the deposit was to enable Caldwell & Co. to raise money *upon the credit [*141] of the broker's certificate, which was to be made out and given to them by Greaves & Co. For that purpose an acknowledgment was given in this form, (the name of J. Forbes being used instead of that of Caldwell & Co.) "Received from Mr. J. Forbes (so many bags of cotton, &c. amounting, &c.) for sale; for the net proceeds of each parcel, when and as received, we promise to be accountable to the said J. Forbes, or his order." Both parties becoming bankrupts, the cotton which remained unsold was demanded by the assignees of Caldwell & Co. from the assignees of Greaves, and, upon their refusal, an action of trover was brought, in which it was contended, that Greaves & Co. as factors, had a lien upon the cotton, to indemnify themselves against the payment of certain bills of Caldwell & Co. endorsed by Greaves & Co., which might be proved against the estate of the latter. Lord Kenyon, after stating that there is no doubt but that in general a factor has a lien for his general balance, on the property of his principal coming into his hands, observed, that the question arose upon the application of that proposition to the present case. It is, says his lordship, a maxim as old as our law, *conventio vincit legem*. The parties may, if they please, intro-

(g) *Hammonds v. Barclay*, 2 East, 227.

(13) † See ante, note (10).‡

(A) || *Randel v. Brown*, 2 Howard, 424; *Chandler v. Belden*, 18 Johns. Rep. 157.||

duce into their contract an article to prevent the application of a general rule of law to it. In order to determine the present case, it is not necessary to consider [*142] how the case would *have been, if there had been no express stipulation between the parties ; for the whole resolves itself into this, that the goods were deposited for a particular purpose. This lien, which a factor has on the goods of his principal, arises upon an agreement which the law implies ; but where there is an express stipulation to the contrary, it puts an end to the general rule of law. Here the parties are bound by their express stipulation, which excludes all idea of a lien, and the goods in question, not having been sold, are to be returned to the plaintiffs, who represent Caldwell & Co. The rest of the Court concurred in this opinion.(h)

So where goods were placed in the hands of a factor, in consequence of an agreement communicated to him, that they were to be sold for the benefit of a particular creditor of the owner, the factor, it was held, could not retain for a demand against the owner.(i)

6. As the lien may be prevented from attaching, so, after

(h) *Walker v. Birch*, 6 T. R. 258.

(i) *Weymouth v. Boyer*, 1 Ves. Jun. 416. ¶ *The Bank of Port Gibson v. Burke and others*, 4 Robinson's (La.) Rep. 440 ; *Foster v. Hoyt*, 2 Johns. Cas. 327. Where a voluntary assignment was executed and a portion of the assigned property was placed by the assignee in the hands of an auctioneer to be sold, who sold the same and received the proceeds thereof, and the assignment was subsequently decreed to be void, and a receiver appointed to take charge of the assigned property ; it was held, that the auctioneer had no lien upon the proceeds of the goods, but was bound to pay over the same to the receiver for the benefit of the creditors of the assignor, who had filed creditors' bills, although the auctioneer was a creditor of the assignor, and the money came to his hands previous to the filing of the bills by the creditors to whose use the money was directed to be paid—the auctioneer having become a party to the assignment, by signifying his assent to the same by a formal acceptance. *Howe v. Henriquez*, 13 Wend. 240.

The lien of a factor is a personal privilege, and cannot be set up by a tortfeasor in defence to an action of trespass by the principal. *Holly v. Huggeford*, 8 Pick. 73.¶

it has attached, it may be lost or destroyed.(A) Goods subject to a lien are in the nature of a pledge,(k) which being personal, cannot be transferred ;(l) so that if the goods be parted with, the lien in general is lost.(m) In the case of **Kruger v. Wilcox*, where the right of fac- [*143] tors to retain for a general balance was first established by a legal decision, it became necessary also to determine whether the factor, by giving up the possession, had not abandoned his right under these circumstances :— The principal, having consigned to his factor a cargo of logwood for sale, soon after came to England, and being desirous to save the commission by selling the logwood himself, directed the factor to give it up to a broker whom he named, which was accordingly done. The Lord Chancellor, who was assisted by the information of four of the principal merchants of London as to the custom, came to the following conclusion upon the second question: “I am of opinion that the factor has parted with his right, and that it is for the benefit of trade to say he has. All the merchants agree, that though the factor may retain for the balance of an account, yet if the merchant come over, and

(A) || *Bryce v. Brooks*, 26 Wend. 367 ; *Holbrook v. Wight*, 24 Wend. 179.||

(k) 3 T. R. 123 ; 6 T. R. 263.

(l) *Daubigny v. Duval*, 5 T. R. 606 ; 1 East, 337 ; but see post, || 216, 217.||

(m) 1 Burr. 494 ; 1 Bl. Rep. 114 ; 1 East, 4. || *Holly v. Huggefurd*, 15 Pick. 76. If the owner gets the property into his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods. *Bronson, J. Grinnel v. Cook*, 3 Hill, 492 ; see post, 145. A party who having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises ; for, in order to sell, the sheriff must have had possession. *Jacobs v. Latour*, 5 Bing. 130. But, a delivery of part of the goods does not extinguish the lien, which may be enforced, to its full extent, upon the residue. *Schmidt v. Blood*, 9 Wend. 268 ; 2 Kent's Comm. 639. If a common carrier be induced to deliver goods to the consignee by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the carrier's lien. *Bigelow v. Heaton*, 6 Hill, 43.||

the factor deliver goods to him, by his parting with the possession, he parts with the specific lien. Such is the law of the land as to retainers in other cases.(n)

In a case of a much more modern date it was decided that a fuller, who by custom was entitled to a lien upon goods for a general balance, had, by shipping the goods [*144] to the order of his *employer, lost the right to detain them though he regained possession of them during the passage.(o)

But though the right to retain for a general balance was held, in both these cases, to have ceased with the possession; yet, in the first mentioned case, the charges upon the goods themselves, as customs, &c. were allowed in equity.

7. These rules, however, are subject to the following qualifications. 1st, If a factor in a foreign country procure goods, on his own credit, he is considered as the consignor, and entitled to stop them *in transitu*, after a shipment to the principal.(p) 2d, Though the actual posses-

(n) Ambl. 254; 1 Burr. 494.

(o) *Sweet v. Pym*, 1 East, 4.

(p) *Feize v. Wray*, 3 East, 93; *D'Aquila v. Lambert*, Ambl. 400; *Snee v. Prescott*, 1 Atk. 244. (*Usparicha v. Noble*, 13 East, 338.)

‡ *Feize v. Wray*, was a case decided on its own peculiar circumstances, and cannot be considered as establishing any principle. It had nothing whatever to do with the lien, or other rights of a factor *as such*. The foreign correspondent by whom the goods were shipped was considered by the Court as having acted in that shipment rather as the vendor of goods to his principal, than as his mere agent for consignment. See the subsequent case of *Siffkin v. Wray*, 6 East, 371.‡ || The case of *Feize v. Wray*, does, however, seem to have settled a disputed question, and for that reason seems to be entitled to a full statement in this place. The case was as follows. In the month of June 1801, an order was given by B. to F. his correspondent abroad, to purchase certain goods for him. F. bought them accordingly of another merchant, who was a complete stranger to B. and had no account or correspondence with him. On the 2d of August the goods were shipped; on the 4th F. drew bills of exchange on B. for the price; and on the 10th, the latter received the bill of lading and the invoice. On the 2d of September B. became a bankrupt, and on the next day the defendant, on behalf of F., obtained from B.'s brother the bill of lading and invoice. B.'s acceptances were never paid. The goods were afterwards sold on ac-

sion be parted with, yet there may remain such a constructive possession as will continue the lien. Thus, though a

count of F. by his agent in this country, [England]; and the assignees of B. having brought trover in order to recover possession thereof, a verdict was found in their favor, subject to the opinion of the court on a special case. The cause accordingly came on for argument, and it was then objected in behalf of the assignees, that F. had no right to detain the goods, because no relation existed between B. and F., on which the right to stop *in transitu* could attach,—inasmuch as F. was a mere factor purchasing on behalf of B., and, as such, had no right to stop *in transitu*, like the vendor or owner of the goods, but had only a lien on them for his balance so long as they remained in his possession. The court however overruled the objections, and decided in favor of the right of F. to retain possession of the goods in question. “It had been contended,” said Mr. Justice Lawrence, delivering judgment in this case, “that the right of stopping *in transitu* does not attach between these parties; that B. must be considered as the principal for whom the goods were originally purchased; that F. was no more than his factor or agent, purchasing them on his account; and that the right of stopping *in transitu* does, in point of law, apply solely to the case of vendor and vendee. If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here from their correspondents abroad to purchase and ship certain merchandize to them; the merchants here, upon the authority of those orders, obtain the goods from those they deal with, and they charge a commission to their correspondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods *in transitu*. But, at any rate, this is a case between vendor and vendee, for there was no privity between the original owner of the goods and B.; but they may be considered as having been first purchased by F. and again sold to B. at the first price, with the addition of his commission upon them. He then became the vendor as to B., and consequently had a right to stop the goods *in transitu*.”

Was it proper to say, that the above “was a case decided on its own peculiar circumstances, and cannot be considered as establishing any principle?” A principle was certainly established, when a factor to purchase, was placed on the same footing as a vendor, as to the right of stoppage for moneys paid, or liabilities incurred for the purchase of goods which he was directed to buy. Mr. John A. Russell in his Treatise on the law of Factors and Brokers, (from which work, p. 221, 222, the foregoing summary of the case of *Feixe v. Wray*, is borrowed,) appears to have thought differently from Mr. Lloyd. After stating the several cases cited by our author and his English editor, he refers to a more recent case in the Court of Exchequer (*Hawkes v. Dunn*, 1 Crom. & Jer. 519,) in which it was decided with re-

shipment by one who has a general lien to the order of the principal, be an abandonment of the lien, yet it [*145] would be *otherwise if the shipment were to his own order.(q)(14) So where an agent, who has a lien upon property to a certain amount, deposits it with a third person as a security to that amount, apprising him of the lien, and appointing him to keep possession as his servant, the lien is not thereby extinguished.(r) 3d. It ap-

ference to the case of a home factor—that where such an agent has made himself responsible for the price of goods which he has consigned to his principal, he may stop them *in transitu*. The writer then proceeds; “And accordingly it may now be laid down as a settled rule in our law,—that wherever either a home or a foreign factor consigns goods to his principal by his order, which goods the factor has procured in his own name and on his own credit, he becomes *quoad* his principal, the vendor of such goods, and has, therefore, the right, in the event of the principal becoming insolvent before his advances in respect of the goods are repaid, to stop them *in transitu*.” Russell on Factors, 222, 223; 2 Kent’s Comm. 542.

But if, at the time the consignment was made, the factor be indebted to his principal on the general balance of accounts to a greater amount than the value of the goods, and such consignment have been in fact made in order to cover this balance, the factor will not have the right to stop the goods *in transitu*; because, under the circumstances, the property therein will vest in the principal absolutely, so as, from the moment of the shipment, to deprive the factor of his lien. *Wiseman v. Vandeputt*, 2 Vern. 203; *Vertue v. Jewell*, 4 Campb. 31. In like manner, if the factor, instead of being primarily liable to the seller for the price of the goods, have become a mere surety for his principal to that amount, he will have no right to stop them *in transitu*; because, it is only by reason of his being liable in the first instance for the price of the goods that he can be considered as a vendor *quoad* his principal to whom he has shipped them, and it seems, that unless he actually possess that character, he cannot exercise the right in question. Lord Ellenborough, *Siffken v. Wray*, 6 East, 371, 381.¶

(q) *Semb.* 1 East, 4.

(14) † He retains by that means the entire disposition and control of the goods.†

(r) *M’Combie v. Davies*, 7 East, 7; *Mann v. Shifner*, 2 East, 529, post, ¶149. *Urquhart v. M’Iver*, 4 Johns. Rep. 103; post, 217; *Everett v. Coffin*, 6 Wend. 603; *Nash v. Mosher*, 19 Wend. 431; *Jarvis v. Rogers*, 15 Mass. Rep. 389, 408, 417. Delivering goods for safe keeping by one who has a lien on them, is not such a departing with the possession as destroys the lien. *Ingersoll v. Bokkelin*, 7 Cow. 670; *Mount v. Williams*, 11 Wend. 79. So, if a factor having goods consigned to him for sale, should

pears to follow, from what has been said of the nature of a general lien, that though the goods which are subject to it have once been parted with, yet if they return into the same possession in the course of dealing, the lien would be restored ;(A) because, as the right would attach upon any fresh goods coming into possession, which is the character of a general lien, there seems to be no reason why it should not equally attach upon the same goods coming back again. And the following authority seems to support that conclusion. This was the case of an insurance broker, who, it has been shown, is considered for this purpose as entitled to the same rights as a factor. The facts were in *substance, that Vaughan, an insurance [*146] broker, being in possession of a policy which had been put into his hands to get it underwritten, returned it to his employer as soon as it was filled up. Afterwards, an

put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods for purposes connected with the sale, and as part payment in advance, or in anticipation of the sale, according to the ordinary usage in such cases. But if the goods be put into the hands of an auctioneer to sell, and, instead of advancing money upon them in immediate reference to the sale according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnor instead of seller, he has no lien on the goods. *Lausett v. Lippincott*, 6 Serg. & Rawle, 386 ; 2 Kent's Comm. 626, 627. Although a party having a lien on goods may transfer the possession subject to that lien to a third person who may lawfully hold the property until the lien be paid, yet if the transferee sell the goods, the owner is remitted to his original rights, freed from the lien, and may bring trover against him. *Nash v. Mosher*, ubi sup.|| Also, where securities, upon which the holder had a lien, were parted with, in contemplation of their being replaced by another security, which did not take effect by the substituted securities proving unavailable ; it seems to have been the opinion of the Court of King's Bench, that an allowance in account might be claimed to the amount of the lien. *Vernon v. Hankey*, 2 T. R. 119.

(A) || Whether this principle will apply to a specific lien, seems doubtful. Story's Ag. § 370. But see *Johnson v. The McDonough*, 1 Gilpin's (Pa.) Rep. 101 ; that a wharfinger has a lien for wharfage, and if a vessel is removed from a wharf secretly or wrongfully, and afterwards brought back without fraud or force, the lien is revived.||

average loss having occurred, Vaughan obtained the policy for the alleged purpose of collecting the average ; but with a view at that time, which he did not disclose, of holding it as a security for his balance. The principal became bankrupt, and the losses were not received by the broker till after the bankruptcy. In an action by the assignees, in which it was insisted on their part, that the broker could not retain for his debt : 1st. Because the debt sued for was not due till the receipt of the money by him, which was after the bankruptcy ; 2d. That the broker, having once parted with the policy, lost his lien upon it, although it afterwards came into his hands again ; Lord Mansfield said, " this is an item of the mutual account ; and I think there is a lien. It is the justice of the case that there should be a general lien ; and the lien revives when the policy comes again into the hands of the broker." (s) (15)

[*147] *There is also another case in which a factor, by parting with the possession of goods, does not forfeit the benefit of his lien, which is where he sells them according to his authority. For, as it would be productive of great inconvenience, if a factor could not sell goods committed to him for sale, without losing the security he has by the possession of them, it has been determined, that the proceeds or securities are subject to the same deductions or lien which the goods in specie were. (t)

† The right of lien may, however, be lost or waived by

(s) *Whitehead v. Vaughan*, Co. B. L. 579.

(15) † There is no doubt that if the documents come back into the possession in the ordinary course of business, the general lien attaches upon them again ; but this is not a *revival* of the former lien. The mode in which the broker in this case obtained possession of the policy ought to have prevented the lien from attaching. *Burn v. Brown*, ante, || 130. || And see further on this subject, *Levy v. Barnard*, 2 Moore, 42 ; || S. C. 8 Taunt. 149 ; || *Wallace v. Woodgate*, Ry. & M. 193 ; || S. C. 1 Carr. & P. 575 ; || *Hartley v. Hitchcock*, 1 Stark. N. P. C. 408. † || *Spring v. The South Carolina Ins. Co.* 8 Wheat. 268. ||

(t) Cowp. 251 ; 3 B. & P. 449 ; || *Spring v. The South Carolina Ins. Co.* 8 Wheat. 268. ||

the special agreement of the parties ; for *conventio vincit legem*, and if the factor enter into a contract inconsistent with the exercise of the right (as if he stipulate for a particular mode of payment) he must be understood as waiving it.(16)†

(16) † 16 Ves. 280. *Walker v. Birch*, 6 T. R. 258 ; *Boardman v. Sill*, 1 Campb. 410, n. ; *Owenson v. Morse*, 7 T. R. 64 ; † ante 140 ; *Hutton v. Bragg*, 7 Taunt. 14 ; *Chandler v. Belden*, 18 Johns. Rep. 162 ; *Hone v. Henriquez*, 13 Wend. 240 ; *Bailey v. Adams*, 14 Wend. 201 ; *Randel v. Brown*, 2 How. 406 ; *Gilman v. Brown*, 1 Mason, 192. Mr. Chancellor Kent, (2 Comm. 637,) states the rule with clearness and precision, as follows : “ The right of lien is also to be deemed waived, when the party enters into a special agreement inconsistent with the existence of the lien, or from which a waiver of it may fairly be inferred ; as when he gives credit by extending the time of payment, or takes distinct and independent security for the payment. The party shows, by such acts, that he relies, in the one case, on the personal credit of his employer ; and, in the other, that he intends the security to be a substitution for the lien ; and it would be inconvenient that the lien should be extended to the period to which the security had to run.” But a special agreement does not of itself destroy the right of lien ; to have that effect it must contain some term inconsistent with that right. *Crawshaw v. Homfray*, 4 Barn. & Ald. 50. So, in a case in which a vessel was libelled in the District Court for compensation for repairs ; on appeal to the Supreme Court of the United States, Thompson, J. in delivering the opinion of the court says : “ An express contract having been entered into between the parties, under which these repairs were made, is no waiver of the lien, unless such contract contains stipulations inconsistent with the lien, and from which it may fairly be inferred that a waiver was intended, and the personal responsibility of the party only relied upon. Express contracts are generally made for freight and seamen’s wages, but this has never been supposed to operate as a waiver of a lien on the vessel for the same. There are certainly some of the older authorities which would seem to give countenance to the doctrine, that an express contract operated as a waiver of the lien ; but whatever may have been the old rule on the subject, it is settled at the present day, that an express contract for a specific sum is not of itself a waiver of the lien, but that to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred.” *Peyroux v. Howard*, 7 Peters, 324, 344. A lien may be lost by setting up a claim hostile to the title of the owner of the goods. *Essex v. Coffin*, 6 Wend. 603 ; *Helbrook v. Wight*, 24 Wend. 169, 179. A factor having a lien on goods consigned to him, by virtue of an agreement with his principal, does not preclude himself from insisting upon his

8. An agent, employed by another, who is himself an agent, with notice, cannot avail himself against the principal of a general lien, which he may be entitled to as against the person immediately employing him. Thus *Jennings*, an English merchant, resident in England in time of *war, received orders from a neutral foreigner to effect insurance upon a ship, the property of the latter. *Jennings* employed his usual broker to get the policy done in his own name, but informed him that the interest was *neutral*. The broker, having received the amount of the loss upon the policy, refused to pay it over to the owner of a ship, insisting upon a right to retain for a demand which he had upon *Jennings*. A verdict was found for the plaintiff, the owner deducting only the premiums upon that particular policy; for Lord Kenyon was of opinion, that the information conveyed by *Jennings* to the broker that the interest was *neutral*, was a sufficient indication that he was only acting as agent for another, though the principal name was not then disclosed; and consequently that the defendant, the broker, had no lien upon the policy as against the plaintiff for his general balance against *Jennings*. And this direction was confirmed by the Court of King's Bench, on a motion for a new trial.(u)

† And upon the same principle it was decided in another case, where an insurance broker had employed a sub-agent to effect policies, informing him at the time that they were

lien, by holding out his principal as the owner of the goods. *Seymour v. Hoadley*, 9 Conn. Rep. 418. Where it is agreed that the owners of a saw mill shall have a lien for their charges in sawing logs into boards, that the boards shall be removed a short distance from the premises, but that the lien shall continue until payment, and the boards are sawed and piled accordingly a short distance from the mill, the lien of the owners of the mill is as perfect, as if the boards were in their mill-yard. *Wheeler v. M'Farland*, 10 Wend. 318.

The factor's right of lien does not necessarily merge the personal responsibility of the principal. Ante, 127, n.¶

(u) *Maane v. Henderson*, 1 East, 335.

for a correspondent in the country ; that the sub-agent had not, as against the principal, a lien on the policies for the general balance due to him from the broker,
 *but a particular lien only for the premiums and [*149] commission.(17)†

(17) [*Snook v. Davidson*, 2 Campb. 218 ; and see also *Lanyon v. Blanchard*, 2 Campb. 597.] ¶ So, where an insurance was declared to be upon the captain's commissions, and the name of the captain was mentioned in the policy ; this was held to be sufficient notice to the broker, that his employer was a mere agent, and he was not allowed to retain. *Foster v. Hoyt*, 2 Johns. Cas. 327 ; 2 Liv. Pr. & Ag. 92. The two cases of *Snook v. Davidson*, and *Lanyon v. Blanchard*, having a material bearing on the subject in the text, it is deemed proper to introduce a full statement of them See 2 Liv. Pr. & Ag. 95, 96.

Snook v. Davidson, 2 Campb. 218, was an action of trover for a policy of insurance. The question was, whether the defendants had a lien upon this policy for the general balance due them from one John Carter. In December 1808, and January 1809, the plaintiffs gave instructions to Carter, an insurance broker, to effect several policies for them. He, instead of doing so himself, without their consent or knowledge employed the defendants, who are likewise insurance brokers, to effect the policies. He told the defendants, they were for a correspondent in the country, and it appeared from the policies themselves, which he delivered to them, that they were for the plaintiffs, as they were all filled up in their names. The defendants got the policies underwritten, and advanced the premiums ; no part of which had yet been repaid to them. All the policies were delivered to Carter, except that on which the action was brought. In January 1809, Carter was declared a bankrupt. The plaintiffs were then indebted to him in a larger sum than the balance due from him to the defendants. The plaintiffs tendered the amount of the premium and commission upon the policy in question ; but the defendants refused to deliver it up, and claimed to retain it as security for the balance due to them from Carter. The defendants' counsel urged, that as the assured had not paid the premiums to any one, and they could suffer no inconvenience if called upon, while these premiums were still due to some one, to pay them to those by whom they had actually been disbursed, Carter might be presumed to have an authority to effect the policies through the medium of another broker, if he could not do the business himself. The plaintiffs having enjoyed the benefit of the labor and money of the defendants, were bound to pay them what was due upon all the policies ; and if they paid this to the defendants, it was clear they could not be again liable to the assignees of Carter, which was the proper rule for deciding the question. But per Lord Ellenborough, "There is no privity between you and this party. A sub-agent employed

The rule, however, is subject to the qualification explained in the following case. Heath, a merchant at Ja-

as the defendants were, cannot acquire the broker's general lien." Verdict for the plaintiffs.

Lanyon v. Blanchard, 2 Campb. 597, was an action to recover the amount of a loss received by the defendant, upon a policy of insurance which he had effected as broker. The plaintiff, being at Montevideo, wrote to one Crowgy, at Falmouth, enclosing an unendorsed bill of lading of some tallow deliverable to the shipper's order, and directed him to effect an insurance on the tallow, and to employ a good house at Liverpool to sell it for the plaintiff's benefit. Crowgy came to London, employed the defendant to effect the insurance, represented that he had authority to endorse the bill of lading, and actually did endorse it accordingly to a person at Liverpool named by the defendant. The ship having been lost, and the defendant having received the money from the underwriters, he claimed a right to retain it, to satisfy a balance due to him from Crowgy. But Lord Ellenborough was of opinion, that in transactions of this sort, if an agent represents himself to have power which is not entrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent, must run the risk of their being true or false; and that as Crowgy had no authority to endorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy from the person for whose ultimate benefit it was effected. Speaking of this case, (*Lanyon v. Blanchard*,) Mr. Livermore (Pr & Ag. vol. 2, p. 97,) says: "This case is not inconsistent with the preceding cases of *George v. Claggett*, [7 Term Rep. 359; post, 329,] *Rabone v. Williams*, [cited 7 Term Rep. 360, n.; post, 329,] *Mann v. Forrester*, [4 Campb. 60; ante, 150,] &c., nor does it at all support Mr. Campbell's statement in the marginal note to the case. The bill of lading showed that Lanyon was the principal, and Crowgy but an agent. There can be no doubt that where a person deals *ex mandato*, and this is known to the person with whom he deals, such person must look to the agent's authority. If by the bill of lading the goods had been deliverable to the order of Crowgy, or if there had been a general endorsement which would have enabled him to hold himself out as the owner of the goods, then, upon the authority of the above cases, the broker would have been entitled to consider him as principal, and to retain for the balance of his account against him. But when, by the bill of lading, the goods were to be delivered to the order of the plaintiff, and there was no endorsement, Crowgy appeared upon the face of the transaction to be acting only as agent, and his mere declaration cannot clothe him with another character."

The reason of the rule was well explained by Lord Chief Justice Tindal.

maica, ordered his correspondents in England, Atherton and Ashley, to insure certain goods shipped by him for Liverpool. They accordingly directed their brokers, Shifner & Co. the defendants, to procure insurance on Heath's account. Atherton and Ashley were creditors of Heath, and debtors of Shifner & Co. The policy remaining in the hands of the brokers, and the loss having been received by them, they insisted upon a right to retain, on the ground that Atherton and Ashley, who were indebted to them, had a lien against Heath. Judgment was given for the defendants; and the court declared, that "their opinion was not founded upon any right which the defendants had to retain the policy, on the ground of having a lien on it to satisfy their claim on Atherton and Ashley; but considering them as the servants of Atherton and Ashley, who were entitled to hold the policy until their claim on Heath was satisfied, on the score of their general balance.(w)

‡ But beyond the general balance due from the principal to the factor, a sub-agent has no *right [*150] of lien against the principal, even for freight, duties, and other charges paid by him, as appears from the following case:—The plaintiffs, foreign merchants, consigned timber to their factors at Liverpool; and they, being unable to make the necessary advances on the consign-

in a recent case,—where the question was as to the right of a banker to retain the property of a third person deposited with him by the agent of that person, for a debt due from the agent himself. The contract of lien "being made between the banker and the customer only, cannot," said his Lordship, "bind the rights of other parties. It is competent to the banker and his customer to agree that the banker shall have a lien on all property on which the customer can lawfully give it, which may come to the hands of the banker; and this agreement may be expressed in words, or may be inferred from the course of trade: but it is not competent for them to agree expressly or in any other manner, that the bankers shall have a lien on the property of other persons on which the customer had no authority to give one." *Brandao v. Barnett*, 2 Scott, N. R. 113; Russ. Fact. & Brok. 200. And so it is manifest, that a factor or broker and his principal are not competent to enter into any such agreement. Russ. Fact. & Brok. 201.||

(w) *Mann v. Shifner*, 2 East, 523, 529, ante, || 145.||(r)

ment, procured the defendants to take upon them the charges, on agreement that they should be allowed one-half the commission. The defendants accordingly paid the freight, duties, &c. and took possession of the timber. The factors became bankrupt, having previously informed the defendants to whom the timber belonged ; but the defendants nevertheless sold it, and claimed to retain the proceeds for their charges. The court, however, were of opinion, on an action brought by the owners, that there was no such right as against them, there being no *privity* between them and the defendants.(18)†

[And insurance brokers who have effected a policy *without notice* that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, and have a right to apply to the satisfaction of that balance, money received [*151] upon the *policy, as well *after* as *before* notice, that it belongs to a third person.(19)]

(18) † *Solly v. Rathbone*, 2 M. & S. 298 ; and see *Schmaling v. Tomlinson*, ante, || 49 ; post, 177 ;|| *Jackson v. Clarke*, 1 Y. & J. 216 ; and see post, || 213, et seq.|| as to pledging by factors.†

(19) [*Mann v. Forrester*, 4 Camp. 60 ; *Westwood v. Bell*, ib. 349, S. P.] † *Bell v. Jutting*, 1 Moore, 155.† || Ante, 130, n. (s) *ibid.* *Westwood v. Bell*, 4 Campb. 349, is a case important in principle, and deserves to be fully stated. The plaintiff a merchant at Leeds, directed Messrs. Hebden his agents there, to procure two policies to be effected for him in London ; and they ordered Robinson & Son of London to effect the policies. Robinson & Son directed Mr. Clarkson, a merchant in London, and who occasionally acts as an insurance broker, to effect them ; and he employed the defendants to make the insurance, as upon his own account. The defendants effected the policies in their own names "as agents," and debited Clarkson with the premiums. A loss happened upon one of the policies. Both policies remained in the hands of the defendants. The plaintiff tendered to them the amount of the premiums, commissions and charges upon these policies, and required them to deliver up that upon which the loss had happened. This the defendants refused to do, claiming a general lien for a balance due to them from Clarkson. Upon this the plaintiff brought an action of trover for the policy. Shepherd, solicitor general, contended, that to allow the general lien claimed would be in effect to enable a factor to pledge the goods of his principal for his own debt. The policy repre-

9. The cases hitherto supposed, in which agents may justify the detention of property in their hands, are founded

sents the goods, and can no more be pledged than the bill of lading. No such authority being conferred by the plaintiff on the Hebden, it could not be transferred through Robinson & Son to Clarkson. If the defendants' claim could be sustained, the security of mercantile transactions would be at an end. No merchant could know with certainty that he was effectually insured; for the agents whom he has employed, may have employed an intermediate agent, who may owe more to the broker, who actually effects the policy, than the whole amount of the property insured. Gibbs, C. J. said: "I am of opinion that the action cannot be maintained. I hold that if a policy of insurance is effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance which they owe him. In this case, Clarkson has misconducted himself, and is liable for not disclosing that he was a mere agent in the transaction; but the defendants, who had every reason to believe that he was the principal, are entitled to hold the policy. If goods are sold by a factor in his own name, the purchaser has a right to set off a debt due from him, in an action by the principal for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bona fide* dealt with him as the owner of the goods, and gave him credit in that capacity. The lien of the policy-broker rests on the same foundation. The only question is, whether he knew, or had reason to believe, that the person by whom he was employed, was only an agent; and the party who seeks to deprive him of his lien, must make out the affirmative. The employer is to be taken to be the principal, till the contrary is proved. If the plaintiff's assent to the employment of Clarkson is denied, then he can have no right to the policy, and there is no privity between the parties. The argument about pledging the policy is fallacious. This never was a policy of the plaintiff's which he held unincumbered, and handed over to his agent. In its very origin and creation it was burthened with the lien. It never has been the plaintiff's for an instant, but subject to the lien which is now claimed. The rights of the parties do not stand on the same footing, as if Clarkson had said he had authority to pledge the policy; but, as if he had said, "The goods to be insured are mine, the policy is for my benefit alone, and I agree that, when it is effected, it shall remain in your hands, till the whole of the balance I owe you is satisfied; and on the strength of it you will continue to trust me." If that had passed, can I say, that the defendants are to be stripped of their rights, on account of a fact of which they had no knowledge, and that they are to deliver up to a stranger the policy which they have effected under a contract, that they should hold it as a security for the balance due to them from their employer? Nor do the cases cited on the part of the plaintiff at all contradict the

upon their own rights. If an agent, however, be placed in the character of a mere stakeholder, and asserts no interest in the property, but cannot, on account of conflicting claims, safely give it up, he may, under particular circumstances, be protected in the detention of it.(A) Thus, a banker, to whom property to a large amount had been entrusted for safe custody, declined to restore it to the owner in prison, under an apprehension, that if the latter remained in confinement two months, and should be thereupon made a bankrupt, he might himself be called upon by the assignees, and obliged to pay the amount over again. Upon this refusal, he was arrested in an action of trover; and upon his application to the Court of Chancery, to be relieved on bringing the amount into court, relief was granted.(x) And perhaps, under circumstances of a similar kind, the court in which the action is brought might think fit to stay the proceedings, upon bringing the money into court, if the claims were in a course to be determined by

doctrine I am laying down. In *Snook v. Davidson*, the person who employed the defendants to effect the policy said, that it was for a correspondent in the country. In *Lanyon v. Blanchard*, likewise, the defendant must be taken to have had notice, that the person who employed him was not the principal. The representation made by Crowgy, that he had authority to endorse the bill of lading, was abundantly sufficient to show that he was only an agent; and I entirely subscribe to what Lord Ellenborough is there supposed to have laid down respecting the risk which the defendant run in giving faith to that representation. The subsequent case of *Mann v. Forrester*, is quite decisive. The doctrine stands upon authority, as well as upon principle. I should have no difficulty in determining the question, were it entirely new; and I find myself strongly fortified in the opinions of other judges. The plaintiff must be nonsuited." See 2 Liv. Pr. & Ag. 89-92. The editor was the less reluctant in presenting the foregoing case in full, as he is sanctioned by Mr. Justice Story who has extracted the whole of the opinion of Chief Justice Gibbs. Story's Ag. § 390, n. 3.||

(A) || Ante, 80. Whether an agent can file a bill of interpleader against his principal, see ante, 10, n. (k).||

(x) *Langston v. Boylston*, 2 Ves. Jun. 101.

*other means; or at least might discharge the [*152] defendant on common bail.(y)(20)

‡ If injury be sustained by the agent in consequence of a deception practised upon him by his principal, there he will of course have a right to compensation. For instance, if goods be sold by an agent under a false representation of their quality, and he be called upon to answer for the fraud, he may seek and obtain redress from his principal, if he were innocently drawn into the fraud by his misrepresentation.(21)‡

(y) *Id. ib. Edwards v. Minett*, 1 Taunt. 166. See also *Field v. Todd*, 2 Ves. Jun. 106.

(20) ‡ The inconvenience of such a case would now be obviated by the statute 1 & 2 Wm. IV. c. 58, cited ante, p. 81, (6).‡

(21) [*Southern v. How*, Bridgman, 126; 2 Moll. 330; Cro. Jac. 468.]
 ¶ Where the plaintiff, an auctioneer, sold goods under order of the defendant, who had no right to dispose of them, and the true owner afterwards recovered against the plaintiff, who brought an action against the defendant, his principal, to recover the amount he had been compelled to pay, a verdict in favor of the plaintiff was sustained on a motion in arrest of judgment made on the ground of the insufficiency of the second count of the declaration. "It was," said the defendant's counsel, "neither *ex contractu* nor *ex delicto*. There was no retainer of the plaintiff by the defendant stated, no employment of him for reward, no promise on either side to raise an *assumpsit*; and there was no allegation of fraud, of misrepresentation,—no *scienter*,—to constitute a tort; on the contrary, whatever might have been the case at the time of the representation it appeared that the defendant was lawfully in possession of the property in question. *Haycraft v. Creasy*, 2 East, 92, was an express decision to show that an action of tort would not lie unless the misrepresentation were wilful and intended to deceive."—Best, C. J. "A motion has been made in arrest of judgment *after verdict*. The plaintiff relies on the second count, on which only his verdict and judgment are to be entered,—stripped of the technical language with which it is encumbered, the case stated on the second count is this: that the defendant having property of great value in his possession, represented to the plaintiff that he had authority to dispose of such property; and followed this representation by a request, that the plaintiff would sell the property for him, the defendant. The plaintiff believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant sold the property, and after paying such sums out of the proceeds, as he was bound to pay, and making

such deductions as he had a right to make, and which the defendant appears to have allowed, paid the residue to the defendant.—The defendant who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been that the plaintiff supposing from the defendant's false representations, he had an authority which he had not, and acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs, whilst the defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.—It has been stated at the bar, that this case is to be governed by the principles that regulate all laws of principal and agent :—agreed : every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be *lawful* if the employer had the authority he pretends to have. A contrary doctrine would create great alarm. Auctioneers, brokers, factors and agents do not take regular indemnities. These would be indeed surprised, if having sold goods for a man and paid him the proceeds, and suffered afterwards in an action at the suit of the true owners, they were to find themselves wrongdoers, and could not recover compensation from him who had induced them to do wrong.—It was certainly decided in *Merryweather v. Nixon*, (8 Term Rep. 186,) that one wrongdoer could not sue another for contribution ; Lord Kenyon, however, said, ' that the decision would not affect cases of indemnity, where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right.' This is the only decided case on the subject that is intelligible."—After referring to some authorities, which it is not material to notice, the Chief Justice proceeds : " These cases rest on this principle, that if a man, having the possession of property, which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in fact the affirmant is not the owner, he is liable to an action.—It has been said that is because there is a breach of contract to rest the action on, and that there is no contract in this case. This is not the true principle : it is this, he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law, guilty of falsehood, and must answer in damages. But here is a contract : the plaintiff is hired by the defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.—But it has been said, you have not shown that the affirmation *was false at the time it was made*, for the breach is not, that plaintiff had not authority to sell at the time he said he had, but at the time of the sale which was subsequent. But the complaint is, that defendant affirmed he had power to sell, and followed that affirmation by a request to sell, which affirmation and request induced plaintiff to sell when defendant had no right to give him authority to make such sale. This affirmation and request caused the plaintiff to do an act which has

[But the rule laid down in *Merryweather v. Nixan*, (22) that there is no contribution among joint wrong-doers, (A) will sometimes affect the right of an agent, and prevent his recovering from his principal a compensation for an injury which he may have sustained by reason of a tort committed at his request. Thus if an agent, at the request of his principal, engage in the commission of an act which at the time is known to be a trespass, even an express promise of indemnity would not be binding upon the principal. And although at the time the act is committed, it were not known to be a trespass, yet, if it eventually [*153] turn out to be so, a promise of indemnity will not be

been injurious to him and beneficial to the defendant. For this injury plaintiff is entitled to compensation, whether the affirmation was false or true at the time it was made. If defendant had authority to sell at the time he employed plaintiff, but ceased to have that authority at the time of the sale, he should have informed plaintiff of this change in his situation, and prevented him from doing what he ought not to have done; at all events he should *not have taken the proceeds of the sale.*" *Adamson v. Jarvis*, 4 Bing. 66. Speaking of the above case, Lord Denman says: "In *Adamson v. Jarvis*, we have the observations of a learned person familiar with commercial law;" and quotes the passage—"auctioneers, brokers, &c.," before cited. *Betts v. Gibbins*, 2 Ad. & Ell. 57; and see *Ramsay v. Gardner*, 11 Johns. Rep. 439; *Powell v. The Trustees of the Village of Newburg*, 19 Johns. Rep. 284; *D'Arcy v. Lyle*, 5 Binney, 441; *Storking v. Sage*, 1 Day, 522; post, n. (22,)(23.)||

(22) [8 T. R. 186.] || "The case of *Merryweather v. Nixan*, has been very much overstrained, even beyond the decision. The rule in that case is, that wrong-doers shall not have contribution from one another; and the exception is, that a party may, with respect to innocent acts, give an indemnity to another, which shall be effectual; although the act, when it came to be questioned afterwards, would not be sustainable in a court of law against third persons who complained of it."—"If one party induce another to do an act which cannot be supported, but which he may do without any breach of *bona fides*, or any desire to break the law, an action on an indemnity, either express or implied, may be supported." Lord Denman, C. J. *Betts v. Gibbins*, 4 Nev. & Mann. 77; S. C. 2 Ad. & Ell. 57; 1 Steph. N. P. 324, n. (67).||

(A) || As to the general rule, that there is no contribution between joint wrong-doers, see *The Attorney General v. Wilson*, Cr. & Ph. 2; *Peck v. Ellis*, 2 Johns. Ch. Rep. 131; *Betts v. Gibbins*, 2 Ad. & Ell. 57; *Coven-try v. Barton*, 17 Johns. Rep. 143; *Arnold v. Clifford*, 2 Sumn. 239; *Du-puy v. John*, 1 Bibb, (Ky.) Rep. 562.||

implied; neither in such case, is there any ground for contribution, if the whole damages recovered for the trespass are levied against the agent.(23) So an express promise

(23) [*Farebrother v. Ansley*, 1 Campb. 343.] || Clearly, no promise to indemnify against the commission of an illegal act will be valid: nor, will a bond of indemnity against such an act be available. *The Trustees of the Village of Newburgh v. Galatian*, 4 Cowen, 340. But the next position in the text can hardly be sustained to the extent there stated. See ante, p. 152, n. (21,)(22). "From reason, justice and sound policy," says Best, C. J. "the rule that wrong-doers cannot have redress, or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." *Adams v. Jarvis*, 4 Bing 66; ante, n. (21); in *Betts v. Gibbins*, 2 Ad. & Ell. 57; ante, n. (22). Lord Denman, C. J. said: "*Fletcher v. Harcot*, (Hutton, 55; S. C. as *Battersey's case*, Winch. 48,) shows that there may be an indemnity between wrong-doers, unless it appears that they have been jointly concerned in doing what the party complaining knew to be illegal. The act there done, was a very strong one; yet, though it turned out to be entirely wrong, the indemnity was allowed. Now, whether the promise there, was express or implied, it would have equally been void if against public policy. That case seems to me to go to this full extent; that where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences." Taunton, J. in the same case observes: "The principle laid down in *Merryweather v. Nixan*, is too plain to be mistaken; the law will not imply an indemnity between wrong-doers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances, whether the act be wrong or not." So, Spencer, C. J. says: "I have no hesitation in saying, that it is a true and just distinction between promises of indemnity which are, and those which are not void; that if the act directed or agreed to be done, is known at the time to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise." *Coventry v. Barton*, 17 Johns. Rep. 142, 144. Mr. Justice Story, makes the like qualification;—that the tort feasons must be "knowingly such." *Arnold v. Clifford*, 2 Sumn. 239. Mr. Livermore, (2 Pr. & Ag. 324,) states the rule, with his usual clearness and precision, as follows: "When a person has been *ignorantly* induced to commit a trespass at the request of another, an express promise of indemnity would be valid. But it is otherwise, where the act is known to be a trespass." The following are direct adjudications upon the subject.

That the plaintiff, at the request of the defendant, entered upon the land of A. which the defendant claimed as his, is a sufficient consideration to support a promise from the defendant to indemnify the plaintiff. *Allaire*

to indemnify a person against that which, from the nature of his office, he must be taken to have been conscious was against law, is void.(24)] † And generally, as has been already observed, no person can recover in respect of any unlawful transaction in which he has been knowingly engaged.(25)†

v. Ouland, 2 Johns. Cas. 52. Where the plaintiff being ordered out by the overseer of highways to work on a certain road, was ordered by the overseer of highways, and by the direction also of the commissioner of highways, to pull down and remove a turnpike gate and fence, erected at the intersection of the road on which the parties were working with a turnpike road, supposing it to be a nuisance, and the plaintiff, accordingly, removed the gate and fence, on the promise of the overseer to indemnify him; this was held to be a valid promise, on which the plaintiff might maintain an action to recover of the defendant an indemnity for what he had been compelled to pay on a judgment, in an action of trespass, recovered against him by the turnpike company whose gate had been so removed. *Coventry v. Barton*, ubi supra. Where two persons are claiming title to personal property adversely to each other, and one of them calls upon a third to assist in removing it, and the assistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law, although it subsequently turns out that the title of the employer was not good, and the act of removal was a trespass. *Avery v. Halsey*, 14 Pick. 174. If a party recover damages *in case* against one of two joint coach proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietors for contribution, if he prove at the trial that he was not personally present when the injury happened. *Woolley v. Batte*, 2 Carr. & Payne, 417.||

(24) [*Martyn v. Blithman*, Yelv. 197.]

(25) † Ante, p. 64.†

CHAPTER III.

THE OBLIGATION OF PRINCIPALS TOWARDS THIRD PERSONS FROM THE ACTS OF THEIR AGENTS.

1. Of the Authority,
Express,
Implied.
2. Of the Execution of the Authority as to the
Person,
Time,
Manner,
Form, &c.
3. Determination of Authority.
4. Extent of,
General and Special Authority.
5. Power of Agent in the Disposition of Goods,
Sale,
Pledge, &c.
6. Principal, how Discharged.
7. Effect of an Authority in general as to the Power of
Contracting.
Notice to Agent,
Delivery to,
Payment to,
Admissions of, &c.
- [*155] *8. Liability of Principals for Frauds, &c. of
Agents.
9. Evidence in Actions against Principals founded on
Contracts, or Acts of Agents.(A)

(A) || The above analysis of the subject, although it may not be perfect, seems to be sufficiently precise for the purpose intended.||

PART I.

THE authority of an agent is either *express* or *implied*. An express authority is either in writing or by parol. It may be proper to consider, first, in what cases an authority must be in writing.

SECTION 1.*Where the Authority must be in Writing.*

1. The form requisite for the due appointment of an agent depends upon the condition of the party represented, or the nature of the service to be performed. In the following cases the substitution must be by deed; viz. Where the appointment is by a corporation aggregate.(a)

(a) 9 Edw. IV. pl. 59; Bro. Corp. 24, 34; 1 Roll. Abr. 514. ¶ By the strict rule of the common law, a corporation can perform no act, except under the corporate seal; but necessity required that this rule should be relaxed, and exceptions were gradually introduced, at an early period. Where a seal is necessary to give validity to the act of an individual, the same formality must be observed by a corporation, which is an aggregate of individuals. The question, however, has arisen, and been much agitated, whether the same acts which would bind an individual without seal, would have the like efficacy, as regards a corporation. This point, however it may still be fluctuating in the English courts, seems to be well established in the jurisprudence of this country, and a corporation is, in general, bound by its contracts either express, or implied, and is liable in the same form of action, either of debt, or *assumpsit*, as a physical being would be, under similar circumstances. The leading case, with us, is the *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299, (which was an action for work and labor, &c. in building the banking-house of the plaintiffs in error,) where the naked, abstract question was presented for decision. Story, J. who delivered the opinion of the court says: "Anciently, it seems to have been

held, that corporations could not do anything without deed. Afterwards the rule seems to have been relaxed, and corporations were, for convenience's sake, permitted to act in ordinary matters without deed ; as to retain a servant, cook, or butler. And gradually this relaxation widened to embrace other objects. At length it seems to have been established, that though they could not contract directly, except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. (*Rex v. Bigg*, 3 P. Wms. 419.) And courts of equity, in this respect, seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. (1 Fonblanque's Equity, 305.) The sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.—The technical doctrine, that a corporation could not contract except under its seal, or, in other words, cannot make a promise, if ever it had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it ; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation ; and all duties imposed on them by law, and benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court that adjudged cases fully support this position. (*Bank of England v. Moffat*, 3 Bro. Ch. Rep. 262 ; *Rex v. The Bank of England*, Doug. 524, and note *ibid* ; *Gray v. Portland Bank*, 3 Mass. Rep. 364 ; *Worcester Turnpike Co. v. Willard*, 5 Mass. Rep. 80 ; *Gilmore v. Pope*, *id.* 491 ; *Andover & Medford Corporation v. Gould*, 6 Mass. Rep. 40.) In the case before the court, these principles assume a peculiar importance. The act incorporating the Bank of Columbia, [the defendants in the court below, and plaintiffs in error,] contains no express provision authorizing the corporation to make contracts. And it follows, that upon principles of the common law it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy, and retain lands, tenements, hereditaments, goods, chattels and effects, of what kind, nature, or quality soever ; and the same to sell, grant, demise, alien, or dispose of ; and the board of directors is authorized to determine the manner of doing business, and the rules and forms to be pursued ; to appoint and pay the various officers, and dispose of the money or credit of the bank, in the common course of banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question, how far the bank notes of this bank were legally binding upon the corporation, and how far a de-

positor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of this court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical, that it would answer no salutary purpose; and would almost universally contravene the public convenience. Where authorities do not irresistibly require the acquiescence in such technical niceties, the court feel no disposition to extend their influence.—Let us now consider what is the evidence in this case, from which the jury might legally infer an express, or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed on the faith of those contracts; to pay money from time to time to the plaintiff's intestate. Although, then; an action might have lain against the committee personally upon their express contract, yet as the whole benefit resulted to the corporation, it seems to this court, that from this evidence the jury might legally infer, that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement." In a late English case, (1838,) *Church v. The Imperial Gas Light & Coke Co.*, 6 Ad. & Ell. 846; Coleridge, J. speaking of the above decision says; "The truth seems to be, that the rule on this subject, has been relaxed in consequence of the necessity produced by changes in the circumstances of the times. It is difficult to reconcile all the decisions with strict legal principles. The changes are traced in a judgment of Mr. Justice Story where he remarks, 'Courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal: and he refers to 1 Fonbl. Eq. 306, n.' "

In relation to this topic, Mr. Chancellor Kent says, in his Commentaries (vol. 2, pp. 288-292): "It was an ancient and technical rule of the common law, that a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal. Afterwards the rule was relaxed; and, for the sake of convenience, corporations were permitted to act, in ordinary matters, without deed, as to retain a servant, cook or butler. The case in 12 Hen. VII. 25, (*Bro. tit. Corporation*, 51,) was, that a bailiff, as a servant to a corporation, could justify without being authorized by deed. So, in *Manby v. Long*, (3 Lev. 107,) it was held that a bailiff to a corporation, for the purpose of distress, did not require an appointment in writing. In *Rez v. Bigg*, the old rule was still further relaxed; and it seems to have been established, that though a corporation could not contract directly, except under their corporate seal, yet they might by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the limits of

his authority. would be binding upon the corporation. In a case as late as 1783, (*Maxwell v. Dulwich College*, cited in 1 Fonb. Tr. 296, note,) it was held, that the agreement that the major part of a corporation entered in the corporation books, though not under the corporate seal, would be decreed in equity. In *Yarborough v. The Bank of England*, (16 East, 6,) it was admitted, that a corporation might be bound by the acts of their servants, though not authorized under their seal, if done within the scope of their employment. At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded, [by the Supreme Court of the United States in the *Bank of Columbia v. Patterson's Adm'r*, ubi sup.]—As soon as it was established that the regularly appointed agent of the corporation could contract in their name without seal, it was impossible to support the other position.—Whatever might be the correctness of the ancient doctrine, that a corporation could only act through the instrumentality of its common seal, when that doctrine was applied to corporations existing by the common law, it had no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a board of directors. The rule has even been broken in upon, in modern times, in respect to common law corporations. The acts of the board of directors, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. With respect to banks, from the very nature of their operations in discounting notes, receiving deposits, paying checks, and other ordinary contracts, it would be impossible to affix the corporate seal as a confirmation of each individual act. Where corporations have no specific mode of acting prescribed, the common law mode of acting may be properly inferred. But every corporation created by statute, must act as the statute prescribes; and it is a settled doctrine, that a corporation may be bound by contracts not under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers.—That corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts to be deduced by inference from corporate acts, without either a vote, or deed, or writing, is a doctrine generally established in the courts of the several states, with great clearness and solidity of argument; and the technical rule of the common law may now be considered as being, in a very great degree, done away in the jurisprudence of the United States.” Mr. Justice Patterson has referred to the passage just cited from Kent’s Commentaries. He observes: “It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the courts of the United States in America. The decisions of those courts, although intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law. It should be stated, however, that, in coming to the decision alluded to, those courts

have considered themselves, not as altering the law, but as justified by the progress of previous decisions in this country and in America. We, on our part, disclaim entirely the right, or the wish to innovate on the law, upon any ground of inconvenience, however strongly made out ; but, when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were very few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it, which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us ; for it is the principle of every case which is to be regarded ; and a sound decision is authority for all the legitimate consequences which it involves." *Beverly v. The Lincoln Gas Light & Coke Co.* 6 Ad. & Ell. 829.

The principle laid down by the Supreme Court of the United States in *The Bank of Columbia v. Patterson's Adm'r*, ubi sup. was followed out and enforced by the same court in *Fleckner v. The Bank of the United States*, 8 Wheat. 338, where Story, J. delivering the opinion of the court says: "The first objection against this evidence is, that the corporation could not authorize any act to be done by an agent, by a mere vote of the directors, but only by an appointment under its corporate seal. And the ancient doctrine of the common law, that a corporation can only act through the instrumentality of its common seal, has been relied upon for this purpose. Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body, or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. In respect to banks, from the very nature of their operations, in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. And if a general authority for such purposes, under the corporate seal, would be binding upon the corporation, because it is the mode prescribed by the common law, must not the like authority exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation ? To suppose otherwise, is to suppose, that the common law is superior to the legislative authority ; and that the legislature cannot dispense with forms, or confer authorities, which the common law attaches to general corporations. Where corporations have no specific mode of acting prescribed, the common law mode of acting may be properly inferred ; but every corporation created by statute, may [must] act as

the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned. Indeed this very point has repeatedly been under the consideration of this court; and in the case of *The Bank of Columbia v. Patterson*, (ubi sup.) and *The Mechanics Bank of Alexandria v. The Bank of Columbia*, (5 Wheat. 326,) principles were established which settle the point, that the corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers."

"By the ancient common law, corporations aggregate were considered incapable of making contracts, or of appointing agents or attorneys to do any binding acts, except by a deed or power in writing under their corporate seal. But the existing law on the subject is, that a corporation may be bound by the acts of its agents, although not under its corporate seal, and even where they are not reduced to writing; except in those cases where by the provisions of the statute of frauds, or otherwise, a contract must be in writing to render it valid, if made by a private person. And the acts and assent of corporations, like those of individuals, when not reduced to writing, may be inferred from other facts and circumstances without a violation of any known rule of evidence." Walworth, Ch. *The American Ins. Co. v. Oakley*, 9 Paige, 496, 500. So, in *The Proprietors of the Canal Bridge v. Gordon*, 1 Pick. 297, 304, Parker, C.J. said:—"It is true that the acts, doings and declarations of individual members of the corporation, unsanctioned by the body, are not binding upon it; but it is equally true, that inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as in the case of an individual; and that a vote is not always necessary to establish such contract or promise." So, a corporation may make a promissory note for a debt contracted in the course of its legitimate business, although not specially authorized by its charter to contract in that form. *Moss v. Oakley*, 2 Hill, 265; *Kelly v. The Mayor, &c. of the City of Brooklyn*, 4 Hill, 263; *Mott v. Hicks*, 1 Cowen, 514. We must now consider these principles as well established in the jurisprudence of this country, that a corporation, whether municipal, eleemosynary, pecuniary or otherwise, unless restricted by the nature of its creation, may, like an individual, make an express contract without seal;—that, like an individual, contracts binding upon it, may arise from implication;—and that upon such contract, either express or implied, it is liable in the same manner, and in the same form of action, as an individual would be, under similar circumstances. Numerous authorities in the courts of this country, in addition to those already adduced, might be cited in support of these positions; a few only, *inter multos alios*, are here referred to. See *Clark v. Mayor, &c. of Washington*, 12 Wheat. 40; *The President, &c. of the Bank of the United States v. Dandridge*, id. 64; *Minor v. The Mechanics' Bank of Alexandria*, 1 Peters, 46; *The President, &c. of the Bank of the Metropolis v. Guttschlick*, 14 Peters, 19; *Attorney General v. The Life and Fire Ins. Co.* 9 Paige, 470; *Danforth v. The President, &c. of the Schoharie and Duaneburgh Turnpike Road*, 12 Johns. Rep. 227; *Dunn*

v. *The Rector, &c. of St. Andrew's Church*, 14 Johns. Rep. 118 ; *Barker v. The Mechanics' Fire Ins. Co.* 3 Wend. 94 ; *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91, affirmed in error, 22 Wend. 348 ; *Mott v. Hicks*, 1 Cowen, 513, 536, 542 ; *Perkins v. The Washington Ins. Co.* 4 Cowen, 645 ; *Hayden v. The Middlesex Turnpike Corporation*, 10 Mass. Rep. 397 ; *Bradlee v. Boston Glass Manufactory*, 16 Pick. 350 ; *Tucker v. Trustees of Rochester*, 7 Wend. 255 ; *Gillett v. Campbell*, 1 Denio, 520, 522 ; *Bulkley v. The Derby Fishing Co.* 2 Conn. Rep. 252 ; *North Whitehall v. South Whitehall*, 3 Serg. & Rawle, 117 ; *Chesnut Hill Turnpike v. Rutter*, 4 Serg. & Rawle, 16.

However definitively the law may be now settled with us, it does not seem to be so in England, and, judging from the general course of recent decisions, the disposition appears to be, perhaps reluctantly, to maintain the strict rule of the old common law. Thus, in 1827, where an act of parliament empowered the directors of a Water Company to make "contracts, agreements and bargains with the workmen, agents, undertakers, and other persons engaged in the undertaking ;" the Court of Common Pleas held, that an agreement for the fabrication and supply of pipes at certain stated periods, was not valid unless under seal. *East London Water Works Co. v. Bailey*, 4 Bing. 283. But in 1837, the Court of King's Bench seems to have somewhat relaxed upon the rule. In *Beverley v. The Lincoln Gas Light and Coke Co.* 6 Ad. & Ell. 829, (cited *supra*,) it appeared that Winter, one of the committee of the company, had ordered six meters in September, 1832 ; they were delivered and their receipt acknowledged by the clerk of the company in November ; one of them was seen in use in January ; on the 23d of April, they were returned as inadequate for the intended purpose ; the plaintiff however refused to receive them, and brought an action of *indebitatus assumpsit* for goods sold and delivered. Two objections were insisted on : 1st. That the action was misconceived in form, for that the contract was executory only ; 2dly. That at all events, *assumpsit* could not be maintained against the defendants, being a corporation aggregate without a head. A verdict for the plaintiff was sustained by the court. Paterson, J. in delivering its opinion, says : " We certainly have not found any decided case in which it has been held that a corporation may be sued in *assumpsit* on an executed parol contract ; a circumstance of great, but not of conclusive weight. For, (not to mention that there is no case in which the contrary has been expressly decided upon argument,) if it be remembered what the course of the law has been on this subject, we shall find that circumstance not unnatural, and that some deduction must be made from the weight of *dicta* unfavorable to our present view, which may be found here and there in the books upon this subject. At first the rule appears to have been exclusive, as indeed its principle required it to be. A corporation, it was said, being merely a body politic, invisible, subsisting only by supposition of law, could only act or speak by its common seal : in the words of Peere Williams, in *Rex v. Bigg*, (3 P. Wms. 423,) was the hand and mouth of the corporation. The rule therefore stood, not upon policy, but on necessity, and was of course equally applicable to small as to

great matters ; to acts of daily or of rare occurrence ; to what regarded personal as well as real property. But this, though true in theory, was intolerable in practice ; the very act of affixing the seal, or lifting the hand, or opening the mouth, could only be done by some individual, in theory quite distinct from the body politic, or by some agent ; the management of the corporate property, the daily sustentation of the members, the performance of the very duties for which the corporation was created, required incessantly that acts should be done, sometimes of daily recurrence, sometimes entirely unforeseen, yet admitting of no delay, sometimes of small importance, or relating to property of little value. The same causes also required that contracts to a small amount should often be entered into. In all these cases, to require the affixing of the common seal was impossible ; and, therefore, from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule : and what we desire to draw attention to is this—that these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle, and justified only by necessity. As each exception of this kind was made, it was not unnatural that the rule in all other yet unforeseen cases should receive confirmation, though it would be hardly fair to anticipate thence what the opinion of the judges would have been, if the cases had been presented before them and required their decision.—In the progress, however, of these exceptions, it has been decided that a corporation may sue in *assumpsit* on an executed parol contract ; it has also been decided that it may be sued in debt on a similar contract ; the question now arises on the liability to be sued in *assumpsit*. It appears to us that what has been already decided in principle warrants us in holding that this action is maintainable. It seems clear, that for a matter of such constant requirement to a gas company as gas meters, and to so small an amount as £15, the company, whether with or without a head, might contract without affixing the common seal ; and it is clear that they might have been sued in debt for goods sold and delivered.” In a later case, however, *The Mayor, &c. of Ludlow v. Charlton*, in the Exchequer, (6 Mees. & Wels. 815 ; S. C. 9 Carr. & P. 242,) it was held that a municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making improvements in the borough, except under the common seal. Rolfe, B. in delivering the opinion of the court, said : “ Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means merely of a technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required as evidencing the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be a matter purely of form, and not of substance. Every one becoming a member of such corporation knows, that he is liable to be bound in his corporate character by

such an act; and persons dealing with the corporation know, that by such an act the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing; either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid, contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience." In a still later case, (1842,) *Arnold v. The Mayor, &c. of Poole*, 4 Mann. & Gran. 860, (cited *infra*, 156, n.) the decision in the case of *The Mayor, &c. of Ludlow* was adopted by the Court of Common Pleas. So, it has been held in Chancery, in 1835, that an entry in the books of a corporation, of the terms of an agreement entered into by them, does not bind them, although it is signed by a majority of the members: and Shadwell, V. C. noticing the case of *Maxwell v. Dulwich College*, decided in 1783, in Chancery, (referred to *supra*,) observes: "I cannot think that this decision can be considered as impugning, in the least, that which I take to be the clear law of the land, namely, that eleemosynary and ecclesiastical corporations are not bound by anything in the shape of agreement, regarding their lands, unless it is evidenced by a deed or writing with their corporate seal affixed to it." *Carter v. The Dean and Chapter of Ely*, 7 Sim. 211, 227.

It seems now to be established, that a corporation may maintain an action of *assumpsit* on a promise whether express or implied, or whether executed or executory, notwithstanding the objection that unless the corporation had bound themselves under their seal, there would be no mutuality in the contract. *The Mayor &c. of Stafford v. Till*, 4 Bing. 75; *Beverly v. The Lincoln Gas Light &c. Co.* *ubi supra*; *Church v. The Imperial Gas Light and Coke Co.* 6 Ad. & Ell. 846; *Arnold v. The Mayor &c. of Poole*, 4 Mann. & Gran. 896. A corporation may clearly bring an action for use and occupation though there was no demise under seal. *Fishmongers' Co. v. Robertson*, 5 Mann. & Gran. 194; *The Mayor &c. of Carmarthen v. Lewis*, 6 Carr. & Payne, 608. But see *East London Water Works Co.* 4 Bing. 283, cited *supra*; *Fishmongers' Co. v. Robertson*, 5 Mann. & Gran. 131. In this last case, (p. 191, 192,) Tindal, C. J. seems to admit, that if the agreement be such that the corporation is not bound thereby, and cannot be sued thereon, so neither can the other party be bound thereby, nor can the corporation sustain an action, as plaintiffs, upon such an agreement: "but" he continues, "whatever may be the consequences, where the agreement is entirely executory on the part of the corporation, yet, if the contract, instead of being executory, is executed on their part,—if the persons who are parties to the contract with the corporation have received the benefit of the consideration moving from the cor-

poration,—in that case, we think, both upon principle and decided authorities, the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation had been, on their part executory only, not executed—we feel little doubt but that their suing upon the contract would amount to an admission on record by them, that such contract was duly entered into on their part, so as to be obligatory on themselves, and that such admission on the record would estop them from setting up as an objection in a cross action, that it was not sealed with their common seals.”

A similar principle has been adopted and applied in equity. Thus, an objection to a bill by an incorporated railway company, for specific performance of a contract for the purchase of land, entered into by their agent, that it did not appear that the agent was authorized under the corporate seal, and, therefore, that there was no mutuality, was overruled, on the ground that the company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a rail road over it. Lord Cottenham said: “There is only one other point, which I need hardly allude to, namely, the objection that there is no mutuality in this contract, inasmuch as the agent of the plaintiffs was not appointed under their corporate seal, and, therefore, they are not bound by his acts. It is not very easy to reconcile all the cases on the subject; but the case of *The Mayor of Stafford v. Till*, (ubi supra) is very similar to the present, as to the circumstances of the parties to the contract. There the Court of Common Pleas thought that the corporation were entitled to support an *assumpsit* for use and occupation against a tenant, who, though he did not hold of them by deed, had had actual enjoyment of their land. So, here the plaintiffs have not only been acting on the contract by entering into possession of the property, but have actually destroyed the property enjoyed by the defendant, previously to the contract, by making their railway over it. If, therefore, it were necessary for the defendant to file a bill against these plaintiffs, I have no doubt that they would be compelled specifically to perform the contract.” *The London and Birmingham Railway Co. v. Winter*, Cr. & Ph. 57–63.

A corporation may be indicted for neglect of duty; *Regina v. The Birmingham &c. Railway Co.* 9 Carr. & P. 469. And is liable for the tortious acts of its agents, or persons in its employ, either in an action of trespass on the case, or of trespass, as either may, under the circumstances, be the proper form of action. *Smith v. Birmingham and Staffordshire Gas Light Co.* 1 Ad. & Ell. 526; *Dater v. Troy Turnpike &c. Co.* 2 Hill, 629, 631; 2 Kent’s Comm. 290, n. a.; *Maund v. The Monmouthshire Canal Co.* 4 Mann. & Gran. 237. The numerous ancient authorities referred to in the last cited case show, on comparison with the late decisions, a very important modification, if not an entire change of the old common law in this respect. *Arnold v. The Mayor &c. of Poole*, 4 Mann. & Gran. 878; *Chesnut Hill Turnpike Co. v. Rutter*, 4 Serg. & Rawle, 6.

The principle being so well settled with us, whatever the law may be in England, that a corporation may be liable on a contract not under seal,

unless restricted by its constitution,—thus reversing the old doctrine, and in effect making the exception the rule,—it seems to follow as a necessary induction, that a corporation may without seal, appoint an agent for all legitimate purposes; and indeed, every appointment of an agent, and acceptance of the agency creates a contract between the parties, which according to its form may be either express or implied. Such has been the general understanding. *Randall v. Van Vechten*, 19 Johns. Rep. 60; *Perkins v. The Washington Ins. Co.* 4 Cowen, 645, 659; *Bulkley v. The Derby Fishing Co.* 2 Conn. Rep. 259; Story's Ag. § 52.

A corporation, like an individual, may render itself liable by affirming the unauthorized act of its agent. *The New England Ins. Co. v. De Wolf*, 8 Pick. 56. Where property was purchased for a corporation by two of its officers, who gave several notes in the corporate name for the purchase money, and afterwards the property was claimed by the corporation and converted to its own use; it was held that this amounted to a ratification of what the officers had done, and that even if the notes were originally given without authority, the corporation was liable upon them. And it was further held, that in a suit brought to recover upon one of the notes, the plaintiff might show that he had obtained judgment by default against the corporation upon another of them, by way of fortifying the evidence of ratification. *Moss v. The Rossie Lead Mining Co.* 5 Hill, 137. The agent of a manufacturing corporation was empowered by its by-laws to manage the affairs of the corporation committed to his care, and to exercise the powers committed to him according to his best ability and discretion, and promptly to collect all assessments and other sums that should become due to the corporation, and to disburse them according to the order of the board of directors, who were made a board of control over him; it was held, that if the board of directors did not interpose to control his operations, the agent had authority to employ workmen to carry on the business of the corporation, and to pay them with its funds, or, not being in funds, to give the notes of the corporation in payment. *Bates v. The Keith Iron Co.* 7 Metcalf, 224. If an agent not appointed under seal, but authorized to act in the premises, execute on behalf of the corporation, an instrument to which he affixes his own seal, the corporation is nevertheless liable in an action of *assumpsit*; for, the corporation, not having itself contracted under its seal, *covenant* will not lie against it; and the act of the agent in putting his seal to the contract, is not a *merger* of the contract made by the corporation through his intervention. *Randall v. Van Vechten*, *ubi supra*.

A corporation may be bound, if not at law, at least in equity, by agreements made by the projectors of the corporation, before its institution; and clearly their power to bind the future corporation must be distinct from every consideration as to the necessity of the corporate seal. Thus, it was held, that an incorporated company will be bound by the agreement of its individual members, acting before incorporation on its behalf, if the company has received the full benefit of the consideration for which the agreement stipulated on its behalf. Lord Cottenham says; "The railway company contend that they, being now a corporation, are not bound by any-

thing which may have passed, or by any contract which may have been entered into by the projectors of the company, before their actual incorporation.—If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract, and that Moss entered into a contract, in his own name, to get the company when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway: it is therefore the agreement of the parties who were seeking an act of incorporation that, when incorporated, certain things should be done by them. But the question is, not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no *legal* obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of *The East London Water Works Co. v. Bailey*, (ubi supra) was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? The powers under the act give them the right; but before that right was so conferred, it was agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot.” *Edwards v. The Grand Junction Railway Co.* 1 Myl. & Cr. 650, 672. See also *Stanley v. The Chester and Birkenhead Railway Co.* 3 Myl. & Cr. 773; *Mitchell v. Great Works Milling and Manufacturing Co.* 2 Story’s Rep. 648. From the objection not being raised in this case, it would seem that the right of the agent to maintain a bill for an account was so far conceded. In a case, at law, where a company before incorporation executed such a mortgage as would be binding upon them as

Unless it be for ordinary and inferior purposes, as a common servant, &c. ;(b) or to such acts as are in the ordinary course of its business as such corporation. The Bank of England therefore, or any similar corporation, may, without deed, empower *persons, as the ser- [*156] vants of the corporation, to make and sign in the name of the corporation bank-notes, bills of exchange, &c.(1)‡ A receiver may be appointed without

a partnership; M'Lean, J., delivering the opinion of the court said; "And here a question arises, whether the acts of these individuals, in their assumed character of corporators are void? May they not hold themselves out to the world as entitled to certain corporate privileges, when they were not so entitled, and afterwards avoid their contract on this ground? This would be a somewhat new, and certainly a most successful mode of practising fraud. It would be enabling a party to take advantage of his own wrong." *Anthony v. Butler*, 13 Peters, 423, 433.‡

(b) Plow. 91; Vin. Ab. Corp. K. || *Church v. Imperial Gas Light Co.* 6 Ad. & Ell. 846; *Arnold v. The Mayor of Poole*, 4 Mann. & Gran. 877. "The principle" says Tindal, C. J. in the last cited case, "to be collected from the old cases appears to be, that an appointment under seal was not necessary in the case of officers or servants required to perform acts of trifling import, or of immediate necessity. If cattle were damage feasant, and it were necessary to appoint a bailiff under the corporate seal in order to distrain them, the cattle might escape while the deed was preparing." See further, the preceding note. The authority of the agent of a corporation to give notice to quit, need not be under seal. *Wolf v. Goddard*, 9 Watts' Rep. 544.‡

(1) ‡ *Rex v. Bigg*, 3 P. Wms. 419.‡ || *Murray v. The East India Co.* 5 Barn. & Ald. 204; *East London Water Works Co. v. Bailey*, 4 Bing. 283; *Church v. The Imperial Gas Light and Coke Co.* 6 Ad. & Ell. 846; *Arnold v. The Mayor &c. of Poole*, 4 Mann. & Gran. 883. When in an action against a corporation, on a contract made by an agent, the plaintiff may give secondary evidence of the agent's appointment, see *Clark v. The Farmer's Woollen Manufacturing Co.* 15 Wend. 256. As to the authority of a cashier of a bank, it has been held that he may *ex officio*, endorse a promissory note, the property of the company, and authorize a demand on the maker and notice to the endorsers. "A cashier cannot transfer the property of the corporation in a note, without authority from them, or perhaps from the directors, pursuant to powers vested in them by the corporation; but he may do what is requisite for the recovery of a note. The defendant in this case has no right to deny the authority of the cashier; for the corporation ratify his act, by bringing the action upon the act done by him." Parker, C. J. *The President &c. of the Hartford Bank v. Barry*, 17 Mass. Rep.

94, 97. So, where a bill was drawn payable to one Patterson or order, which by a course of negotiation became the property of the bank of Passamaquoddy; was endorsed by the cashier on behalf of the bank, and came to the possession of the plaintiff by a subsequent endorsement; was duly presented to the drawee and protested for non-acceptance, and due notice thereof given to the bank, it was objected on the trial, that it was not shown by the plaintiff, that the cashier was specially authorized to endorse the bill in behalf of the bank. Story, J. "The cashier of a bank is, *virtute officii*, generally entrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and endorse negotiable securities, held by the bank, for its use, and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case it is incumbent on the bank to show, that it has interposed a restriction, and that such restriction is known to those, with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, endorsed the bill in behalf of the bank, and this is *prima facie* evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority it was for the defendants to show it. The proof is in their possession, and the plaintiff who is a stranger to their regulations, cannot be presumed to be conversant of it." *Wild v. Bank of Passamaquoddy*, 3 Mason, 505. The same learned and lamented judge in delivering the opinion of the Supreme Court of the United States in a later case, says; "The ordinary usage and practice of a bank, in the absence of counter proof must be supposed to result from the regulations prescribed by the board of directors; to whom the charter and by-laws, submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient but perilous for the customers, or for any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice and course of their business: and their acts within the scope of such usage, practice and course of business, would, in general, bind the bank in favor of third persons possessing no other knowledge." *Minor v. The Mechanics Bank of Alexandria*, 1 Peters, 46, 70; *Safford v. Wyckoff*, 4 Hill, 442; S. C. 1 Hill, 11. See farther as to the authority of a cashier of a bank, *Fleckner v. The President &c. of the Bank of the United States*, 8 Wheat. 338; *Bellows v. The President &c. of the Hallowell and Augusta Bank*, 2 Mason, 31, 46; *Spear v. Ladd*, 11 Mass. Rep. 94; *The President &c. of the Northampton Bank v. Pepon*, id. 288; *Mechanics Bank of Alexandria v. The Bank of Columbia*, 5 Wheat. 326; *Bank of the United States v. Dunn*, 6 Peters, 51; *Bank of the Metropolis v. Jones*, 8 Peters, 12; *The President &c. of the Salem Bank v. The President &c. of the Gloucester Bank*, 17 Mass. Rep. 1. Notice to the cashier is notice to the bank. *Boggs v. Lancaster Bank*, 7 Watts & Serg. 331.

deed.(c) An assignment of auditors without deed is good.(d) A corporation may appoint a bailiff to distrain without deed or warrant,(e) for it neither vests nor divests any sort of interest in or out of the corporation.(f) But in order to authorize an agent to seize forfeited goods on behalf of a corporation aggregate, his appointment must be under the common seal, and must be so pleaded in a justification by the agent himself.(g) But if the corporation itself justifies, or where it is alleged that the corporation entered, it is not necessary to state a deed, that being intended.(h)

A corporation may appoint an attorney upon record without the common seal.(i)

Whether a director of a bank is such an agent as that his acts would be binding upon the bank, see post.||

(c) Per Townsend, J. Bro. Corp. 47 ; but Brian, J. contra, that a corporation aggregate can do nothing without deed.

(d) Per Littleton, Bro. Corp. 48.

(e) 3 Lev. 127, but not in assize. Plow. 91, nor to enter for a condition broken. 1 Roll. Abr. 514 ; Bro. Corp. 59.

(f) Salk. 191. || A corporation is liable in tort for the tortious act of its agent in making a distress, though not appointed by seal, if such act be an ordinary service—Taunton, J ; “ With respect to the question of law, I am clearly of opinion that the seal of the corporation was not necessary for the appointment. As long as I can recollect, it has been the text law, that a corporation may give a warrant to distrain without deed. The distinction is between matters which do, and matters which do not affect any interest of the corporation. Thus they must appoint a bailiff by deed for entering lands for condition broken in order to revest their estate ; but they need not do so where the bailiff is only to distrain the rent.” Williams, J. “ I am of the same opinion. I will advert to one case which has not been cited. In *Doe dem. Dean & Chapter of Rochester*, 2 Camp. 96, M'Donald, C. B. held, that a verbal notice to quit, given by the steward of the Dean & Chapter, was sufficient without any other evidence of his authority ; and that the Dean & Chapter showed that they authorized and adopted the act by bringing the ejectment.” *Smith v. The Birmingham & Staffordshire Gas Light Co.*, 1 Ad. & Ell. 526 ; ante, 155, n. (b) ; post, 190, n. (c).||

(g) 2 Keb. 567, 604 ; 1 Mod. 18.

(h) 2 Saund. 305 ; Cro. Car. 169.

(i) *Mayor of Thetford's case*, per Holt, 1 Salk. 192. || In *Osborn v. The President &c. of the Bank of the United States*, 9 Wheat. 738, the objection was raised by the applicants, who were defendants in the court below, that no authority was shown in the record, from the bank authorizing the

institution or prosecution of the suit ; but the objection was not sustained ; and Marshall, C. J. delivering the opinion of the court says : “ It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal, on the contrary, the principle decided in the cases of the *Bank of Columbia v. Patterson, &c.* is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is, whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself. Natural persons may appear in court, either by themselves, or by their attorney. But no man has the right to appear as the attorney of another, without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is in fact, the attorney of another. The case of an attorney at law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority ; and no additional evidence, so far as we are informed, has ever been required. The argument supposes some distinction, in this particular, between a natural person and a corporation ; but the court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the practice is as uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentlemen admitted to the bar of the court. The usage, then, is as full of authority for the case of a corporation, as of an individual.”

The position in the text has, however, so far at least as regards municipal corporations, been overruled, in England, by a recent decision, where it was held, that no municipal corporation, (but that of London,) could appoint an attorney of record, except under the corporate seal. *Arnold v. The Mayor, &c. of Poole*, 4 Mann. & Gran. 860. As regards the exception as to London, Tindal, C. J. (*ibid.* 882,) says : “ It is an isolated case.

It has been done from the earliest times, and is a solemn proceeding in the courts at Westminster. The lord mayor comes to the bar of this court, attended by the late lord mayor, several members of the corporation, and the recorder as the mouth-piece of the corporation; the appointment of the attorney is read and is entered on record, on the prayer of the recorder. This proceeding has been sanctioned by ancient custom. It may rather be said,—*Exceptio probat regulam.*” In delivering the opinion of the court in this case, the Chief Justice (*ibid.* 895) observes: “These two classes of cases, viz. those relating to the appointment of servants by corporations aggregate, and those founded on simple contracts entered into by trading companies, and the principle upon which they may be supported, were lately considered by the Court of Exchequer, in *The Mayor, &c. of Ludlow v. Charlton*, 6 Mees. & Wels. 815; (*ante*, 155, n. a.;) and it was held by that court, that a municipal corporation was not bound by a contract to pay money, although the consideration had been executed, such contract not being made under their common seal. That case appears to us to be direct authority in favor of the present defendants; for the appointment of an attorney to conduct important suits, affecting the rights and property of the corporation, cannot be considered a trifling matter; nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone it until the seal of the corporation can be affixed to the retainer. Still less can it be said, that the retainer of an attorney falls within the principle of the decisions relating to contracts made by corporations established for trading purposes.” The suit in this case was brought by the attorney, against the corporation, for costs, part of which had accrued during a period when he was not, and another part whilst he was duly authorized to act, and he had received moneys from the corporation on account, generally. He was allowed to appropriate the money to bills of costs arising while he was acting without legal authority. “The claim of the plaintiff on these two bills was a just and equitable claim, although from the absence of a contract under seal, it could not be made the subject of an action in a court of law.” *Ibid.* 897.

The law is now established in this country, that, like most other matters of fact, the valid appointment of the officers of a corporation may be presumed from circumstances. “We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force.—Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which pre-suppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which pre-supposes a delegated authority for the purpose, and other corporate acts show that the

Formerly an authority by a corporation to prove debts under a commission of bankruptcy must have been [*157] under seal, and produced at the *time of proof.(k)

‡ But now, by the 46th section of the new Bankrupt Act, corporations and public companies may prove by an agent, however appointed, the only proof of authority required being the personal oath of the agent before the commissioners.

No person, however, can vote in the choice of assignees as the agent either of an individual or a corporate body, unless appointed by letter of attorney.(2)‡

2. An authority by deed is necessary in order to bind the principal under seal.(A) This was admitted in a case

corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty." Story, J. *The President, &c. of the Bank of the United States v. Dandridge*, 12 Wheat. 64.¶

(k) Co. B. L. 124, ed. 1799.

(2) ‡ Sect. 61.‡

(A) ¶ 2 Kent's Comm. 614; *Van Ostrand v. Reed*, 1 Wend. 424; *Hanford v. McNair*, 9 Wend. 54; *Blood v. Goodrich*, id. 68, 75; S. C. 12 Wend. 525; *Lawrence v. Taylor*, 5 Hill, 113; *Banorjee v. Hovey*, 5 Mass. Rep. 11, 40; *Commonwealth v. Griffith*, 2 Pick. 18; [It is extraordinary that the main principle presented in the last cited case, which however has nothing to do with the subject of this work, should be decided by the Supreme Court of Massachusetts, in the manner it was; Mr. Justice Thatcher dissented, and on grounds, which if the same question were to be brought again before that court, they would probably deem conclusive.] *Delius v. Cawthorne*, 2 Devereux (N. Car.) Rep. 90; *M'Kee v. Hicks*, id. 379; *Davenport v. Sleight*, 2 Dev. & Battle's (N. Car.) Rep. 381; *Cooper v. Rankin*, 5 Binney, 613. Where a party has executed a deed leaving blanks after to be filled up, a mere parol authority to fill up the blanks is insufficient. Mr. Baron Parke, in declaring the opinion of the Court of Exchequer, after examining several authorities, concludes: "It is unnecessa-

ry to go through the others which were cited on the argument. It is enough to say that there is none to show that an instrument, which, when executed, is incapable of having any operation, and is no deed, can afterwards become a deed, by being completed and delivered by a stranger in the absence of the party who executed, and unauthorized by instrument under seal.—In truth, this is an attempt to make a deed transferrable and negotiable like a bill of exchange, or exchequer bill, which the law does not permit.” *Hibblewhite v. McMorine*, 6 Mees. & Wels. 200. See Story’s Ag. § 49, n. (1,) from which this citation is borrowed. There are, however, cases in which a schedule or inventory may be annexed to a deed after execution. *Keyes v. Brush*, 2 Paige, 311; *England v. Downs*, 2 Beav. 522; *Halsey v. Whitney*, 4 Mass. Rep. 219.

The subject is well considered by Ruffin, C. J. in the Supreme Court of North Carolina, in a case already referred to. It was an action of debt on bond to which the defendant pleaded *non est factum*. It appeared on the trial, that one Frasier brought a certain bond to the house of Davenport, the plaintiff, already written, excepting a blank for its amount, and signed and sealed by Sleight, the defendant. Frasier, as the agent of the defendant, made an agreement with the plaintiff for the purchase of a vessel; whereupon he filled up the blank with the agreed price, attested the instrument, and delivered it to the plaintiff. After the vessel had come into the possession of the defendant, he admitted that he had signed and sealed the instrument in blank, and had sent Frasier to the plaintiff to make the best bargain he could, and had verbally authorized him to fill up the blank, and deliver it as his, the defendant’s, bond. Upon this evidence the plaintiff was nonsuited; and the nonsuit was sustained by the court *in banc*. Ruffin, C. J. “The instrument sued on is not in the opinion of the court, the bond of the defendant. When put into the hands of Frasier, it was not a deed, because it was imperfect, and did not purport to oblige the payment of any sum of money. The parol authority to Frasier to fill up the blank with the sum that might be agreed upon as the price of the vessel, we think, is not a valid authority to deliver the paper, thus completed, as the deed of the defendant.—The ancient rule is certain, that authority to make a deed cannot be verbally conferred, but must be created by an instrument of equal dignity. It is owned, that there are modern cases in which it seems to have been relaxed with respect to bonds.—The court is not satisfied with the reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences. Because bonds are in frequent use, as mercantile instruments, and are negotiable, [?] it seems to have been thought that they may be safely treated as if altogether of that character. If they can be filled up upon a verbal authority, the step is, indeed, a short one to allow the holder to do so; and a bond may be made by signing and sealing a blank piece of paper, as a promissory note may be by signing it. We think the difference is in the solemnity of the instruments. The danger of abolishing that distinction consists in the ne-

cessity, that would then arise, of applying the rule as modified, to conveyances and deeds of every description, as well as to this particular kind, namely, bonds. No person will argue in favor of a deed of conveyance, in which the name of the bargainee, for instance, or the description of the land, were inserted after execution by the vendor and in his absence, although done without corruption, and by some person whom he requested to do it. It would subvert the whole policy of the law, which forbids titles from passing by parol, and requires the more permanent evidence of writing and sealing. A bond is to be regarded precisely on the same footing with any other deed. To make a bond out and out in the name of another, certainly requires a letter of attorney by deed. A verbal authority to *seal* a bond, is not sufficient. To make the instrument a different one in form and substance from what it was when the supposed obligor parted from it—to make it a sensible, and upon its face, an operative obligation to pay a certain sum out of a writing, which was altogether insensible, and did not bind the obligor to pay any sum—is essentially to *make* the bond. In none of the cases is it suggested, that such acts can be done by a stranger. But it is said, the party ought to be bound, because the words were inserted by his agent. This is assuming the position in dispute. There might be an agency to receive the money, or make the purchase, which would in law be sufficient, when there was not an agency to bind the principal by this form of security. The very question is, whether the person who wrote out the bond and delivered it, was in fact and in law, the agent for that purpose. To determine it, we are obliged to recur to the rule of law which defines what may create an authority to make a deed, and by what evidence that authority may be established. If it cannot legally exist without a deed, then he who had only a verbal authority, was not in law an agent for this purpose, though he might have been for others. We think, likewise, that the defendant has not made it his bond by any subsequent act. If a deed be perfect in its frame, there is no doubt the execution of it by one party is good, and the instrument will not be invalidated by the execution of another party to it, in the absence of the former. But when it is incomplete when executed, it is well settled that the insertion of the matter which is necessary to perfect it, avoids it as a deed, as first executed and by force of that delivery, unless after the alteration there be a re-delivery, or that which is tantamount to it. The case cited for the plaintiff, (*Hudson v. Revett*, 5 Bing. 368; and see *infra*,) admits this; and determines only, that filling up a blank, in the presence of the party, and by his assent, is in law a re-delivery. We see no objection to that position. But it has no application to the case at bar. Here, the defendant never saw the bond after it first came to the plaintiff's hands. Nothing that he could say in the absence of it could amount to the adoption of it as his deed,—the essential requisite of delivery by himself, or by his attorney duly authorized, in its altered state being wanting. But what the defendant did say, is certainly quite insufficient. It is simply an acknowledgment, that by parol, he ap-

pointed Frasier his agent, first to buy the vessel, and secondly to fill up the bond. The acknowledgment of those facts, establishes no more than the proof of them by witnesses would. They very clearly establish a case in which the plaintiff could recover the price of the vessel on the contract of sale. But they show only an insufficient authority to fill up and deliver the bond; and do not in the least denote an intention of the defendant, (if that would do) to be bound by it as his bond; much less amount to a delivery of it as such. It is not, therefore, the deed of the defendant, &c." *Davenport v. Sleight*, 2 Dev. & Battle's (N. Car.) Rep. 381.

The case of *Hudson v. Revett*, referred to by the learned Chief Justice of North Carolina, was as follows: The defendant executed a deed, conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in the deed; a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained was inserted in the blank, the next day, in the defendant's presence, and with his assent; he afterwards recognized the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed: it was held that the deed was valid, notwithstanding the filling up of the blank after execution. Best, C. J. examines the subject, and the authorities; and in concluding his opinion says: "I shall not after what I have said, travel through the different cases that have been cited with respect to the alteration of deeds; but I beg not to be taken as deciding, that if a deed be altered with the consent of all the parties, after it is executed, it is not to be considered as a good deed. I think, if we were driven to examine that question, it would be found that in those times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will in its altered shape, be a good deed, but I do not decide this case on that ground. I decide it on this, that it was either no deed at all, until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was declared only to have operation from the time that those sums were written in, which were to give it all its effect. I think we must take it, from what passed at the time of execution, it was not to be considered as having effect till it could have its full effect, by all the sums being written in, that were to be written in." It is to be observed that the issue tried in this case was not an issue made by the pleadings in a cause; but, as must necessarily be inferred from the report, which ought certainly to have been more explicit, was a question arising upon some motion, in which it was necessary for the court, assuming the functions of a court of equity, to direct certain facts to be ascertained in order to guide it in the exercise of its equitable jurisdiction. A course by no means unusual. Gaselee, J. regards it as analogous to an issue out of chancery, and concurred with the other judges in refusing a new trial, notwithstanding objections to the competence of a witness, which, according to strict legal rules, might have been deemed conclusive. "If," he says, "upon the whole, we see that justice has been done, there is no occasion to send it down to a new trial."

“Where an instrument under seal appears to be executed by attorney, and the authority of the attorney is disputed, before the instrument shall be admitted to the jury, the letter of attorney shall be produced to the court, who are to judge of its competency to sustain the act of the attorney. But in all contracts made by agents or attorneys, in which the authority may be proved by oral testimony, the fact of signing, and of the power to sign are both questions entirely for the jury; and the order in which they shall be admitted is a matter of indifference.” *Parker, C. J. Emerson v. The Providence Hat Manufacturing Co.* 12 Mass. Rep. 240. See further as to alteration of deeds by consent of parties. *Hartley v. Munson*, 4 Mann. & Gran. 172.

But it is not requisite that the appointment should be by deed, even when the attorney is to make a deed, when the principal is present; his verbal, or even implied authority, in such case is sufficient: as, if the principal ask the attorney to write his name to a deed in his presence. *Ball v. Dunster-ville*, 4 Term Rep. 313. *Sutherland, J. Hanford v. Mc Nair*, 9 Wend. 56. This position seems to be very clear; otherwise a party who from blindness—some other physical defect—inability from want of education to write his name—would be unable to make a valid disposition of his property. In a case in which one of the attesting witnesses to a will could not write or read, but another attesting witness held and guided his hand, so as to make his signature, Lord Denman, C. J. asks, “Is there any doubt, that if a man were paralytic, and got some one to hold his hand while he wrote, that would still be his hand-writing?” Afterward in delivering the judgment of the court, the Chief Justice says: “The question in this case was whether the will had been properly attested, one of the subscribing witnesses not knowing how to write, and his hand being guided by another person. It was suggested, as a difficulty, that the signature of a witness unable to write for himself could not be proved, if brought in question after his death. But this is only a kind of inconvenience which is inseparable from all modes of attestation.” *Harrison v. Elvin*, 3 Ad. & Ell. N. S. 117. This case is stated as furnishing an argument *a fortiori*.

If the act to be done by the agent, or attorney, be not of such a nature as that to give it validity, it must be done under seal, it seems that the want of a sealed authority, cannot be objected to the execution of the power, although the agent or attorney did execute it by means of a sealed instrument. *Lawrence v. Taylor*, 5 Hill, 107, *infra*, n. (1). This position must, however, be confined to the mere transmission of property, which might be conveyed by the principal himself without a sealed instrument, or to the exclusion of a right which the principal might, as for instance by the execution of a release, have divested himself; but it certainly does not extend to the imposing of a new obligation on the principal, or the passing of an interest in real estate. *Harrison v. Sterney*, 5 Cranch, 289; 2 Kent's Comm. 614; 3 Kent's Comm. 47; Story on Part. § 117, 119; *Everit v. Strong*, 5 Hill, 163; *Anderson v. Jenkins*, 1 Brockenbrough, 456; *Wells v. Evans*, 20 Wend. 258; *Banorgue v. Hovey*, 5 Mass. Rep. 11. “If the contract may be made without deed, the seal shall not prevent its enuring as a simple contract

where it was determined that even a partner, though the articles of partnership were under seal, is not empowered to bind his co-partners by deed without an authority of as high a nature.⁽¹⁾ And in an action of covenant on a char-

though the authority be by parol, or merely implied from the relation between the principal and agent." *Cowen, J. Lawrence v. Taylor*, 5 Hill, 113.||

(1) *Harrison v. Jackson*, 7 T. R. 269. (*Elliot v. Davis*, 2 Bos. & Pul. 338.) || "It is a general rule of the common law, that one partner, from that mere relation, cannot bind the others by a deed or instrument under seal, either for a debt or any other obligation, even when contracted in the course of their commercial dealings and business, and within the scope thereof; unless indeed the authority be expressly given under the seals of the other partners, and include the very act done under seal. The reason of this rule seems to be purely technical, and has its origin in the general doctrine of agency at the common law; where it is held, that an agent or attorney cannot execute a deed or sealed instrument, in the name of his principal, so as to bind him thereby, as the proper party thereto, unless the authority is conferred upon him by an instrument of equal dignity and solemnity, that is by one under seal." Story on Part. § 117. In the next sentence the learned writer proceeds: "And yet the common law does not seem in all cases to follow out its own principle; for it is not required to execute any instrument or writing not under seal, that authority to an agent, or attorney, or partner should be in writing. It may be by parol, or even be implied from circumstances." This last passage is deficient in precision, if not in accuracy. It is not the principle of the common law that the authority to execute a written instrument, should be a written authority, but that the authority to execute a sealed instrument should be under seal. As to the general doctrine that one partner cannot bind the others by an instrument under seal. See further 3 Kent's Comm. 47; 1 Liv. Pr. & Ag. 30; Story on Part. § 119; *Hall v. Bainbridge*, 1 Mann. & Gran. 42; *Ludlow v. Simond*, 2 Caines' Cas. 1; *Green v. Beals*, 2 Caines' Rep. 254; *Clement v. Brush*, 3 Johns. Cas. 180; *Karthus v. Yllas y Ferrer*, 1 Peters, 222; *Tom v. Goodrich*, 2 Johns. Rep. 213; *Buchanan v. Currie*, 19 Johns. Rep. 137; *Skinner v. Dayton*, id. 513; *McBride v. Hagan*, 1 Wend. 334; *Hanford v. McNair*, 9 Wend. 57; *Blood v. Goodrich*, id. 75; S. C. 12 Wend. 523, 527; *Wells v. Spring*, 20 Wend. 251; *Cady v. Shepherd*, 11 Pick. 400, 406; *Tapeley v. Butterfield*, 1 Metcalf, 517, 518; *The United States v. Astley*, 3 Wash. C. C. Rep. 508; *Cooper v. Rankin*, 5 Binney, 615; *Gerard v. Basse*, 1 Dall. 119; *Host v. Withery*, 1 Penn. Rep. 285; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) Rep. 280; *Fisher v. Tucker*, M'Cord's (S. Car.) Ch. Rep. 170; *Williams v. Hodgson*, 2 Har. & Johns. (Md.) Rep. 474. In pursuance of this doctrine, a bond, given at the

ter-party, it appearing that the deed was executed by G. D. "for and on behalf of the defendants," but that G. D. had

custom house, for the payment of the duties on goods imported for, and belonging to the partnership, will not bind the partnership, but only the partner signing and sealing the same. To cure this very difficulty, Congress have been compelled to pass an act, providing that such a bond given and sealed in the name of the firm, or partners, under his seal, shall be binding on all of them. Act of Congress, of 1 March, 1823, Ch. 149, § 25; 2 Story on Part. § 119, and n. (2.) *ibid.* The authorities already referred to abundantly show, that although the partner cannot bind his co-partners by deed, yet he may thereby assume a personal obligation upon himself.

But a partner may release a debt or claim of the partnership by deed under seal, which will be binding upon the partnership; and this proceeds upon the principle that it is competent for each co-obligee or joint creditor, to release the debt. 3 Kent's Comm. 48, 49; Story on Part. § 120; *Pierson v. Hooker*, 3 Johns. Rep. 68; *Bulkley v. Dayton*, 14 Johns. Rep. 387; *Bruen v. Marquand*, 17 Johns. Rep. 58; *McBride v. Hagan*, 1 Wend. 326; *Stead v. Salt*, 3 Bing. 101; *Halsey v. Whitney*, 4 Mason, 231; *The United States v. Astley*, 3 Wash. C. C. Rep. 511; *Salmon v. Davis*, 4 Binney, 375. Although one partner cannot bind his co-partner by seal, where the effect of the instrument thus executed is to charge the firm, yet it is competent to him, by an instrument under seal, to authorize a third person to discharge a debt due to the firm. *Wells v. Evens*, 20 Wend. 251; S. C. in error, 22 Wend. 324, 334.

So, also, in bankruptcy, one partner may execute a deed, and do any other act requisite in proceedings in bankruptcy, and thereby bind the partnership. This is another exception to the general rule, that one partner cannot bind the company by deed. *Ex parte Hodgkinson*, 19 Ves. 291; 3 Kent's Comm. 49. There are further exceptions. One partner may by deed under seal assign a chose in action due to the firm; *Everit v. Strong*, 5 Hill, 163; *Halsey v. Whitney*, *ubi supra*; and may by deed, convey or charge any property of the firm which he might have conveyed without deed. *Anderson v. Jenkins*, 1 Brockenbrough, 456; *Milton v. Mosker*, 7 Metcalf, 244. In *Tapley v. Butterfield*, 1 Metcalf, 515, a sealed mortgage made by one partner, in the absence of the other, and without his knowledge, of the whole stock in trade of the firm, was held valid. Shaw, C. J.; "We are not aware that a mortgage of personal property requires a deed. If an act be done, which one partner may do without deed, it is not the less effectual, that it is done by deed. It is clearly within the scope of partnership authority, (I speak of a partnership between merchants, the object of which is the buying and selling of goods,) for one partner to sell such goods as have been purchased for sale. Supposing then a customer purchasing for some special purpose of his own, should, instead of a sale by parol, or a common bill of parcels, or a bought and sold note, choose to have a formal

only a verbal authority from the defendants to execute the authority, Lord Kenyon held that the action could not be

bill of sale under seal, in the name of the firm, and such bill should be exchanged by one of the partners ; though the firm might not be liable to an action on the special covenants, yet the property would pass. And although the bill of sale should purport to be the act of both, it would not be the less the act of him who made it ; and as his act would be sufficient to pass the property, it would not be the less available because the name of his partner was added in such a form as to be imperative.—It is within the general scope of partnership authority for one partner to sell and dispose of all the partnership goods, in the orderly and regular course of business. It is also within the scope of partnership authority, to pay the debts of the firm, and to apply the assets of the firm for that purpose. He being authorized to sell the goods to raise money to pay their debts, he may apply the goods directly to the payment of the debts ; and, according to the exigencies of the occasion, he may pledge the partnership goods to raise money to pay the debts of the firm. To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation. If it were in the form of a consignment to a commission merchant, or an auctioneer, and an advance of money obtained for the use of the firm, we think there could be no question but that it would be within the scope of partnership authority.—To what extent one partner can bind another in the disposition of the entire property of the concern is a question of power, arising out of the relation of partnership, and does not, we think, depend upon the form or manner in which it is exercised.—But considering that the authority of selling and pledging the personal property is within the scope of partnership power, and may be done by either partner ; and considering that it may be done without deed ; the court are of opinion that such a mortgage, made by one partner in the absence of the other, although unnecessarily made by deed, was binding upon the property.” And see *Egberts v. Wood*, 3 Paige, 517. Whether one party can make a general assignment to trustees for payment of partnership debts, see *Havens v. Hussey*, 5 Paige, 30, where Walworth, Ch. says : “ The principle upon which an assignment by one partner in payment of a partnership debt rests is, that there is an implied authority for that purpose from his co-partners, from the very nature of the contract of partnership, the payment of the company debts being always a part of the necessary business of the firm ; and while either party acts fairly within the limits of such implied authority, his contracts are valid and binding upon his co-partner. One member of the firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any other of the co-partnership effects ; although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a

maintained: for that a deed could not be executed by an agent, so as to bind the principal, unless he were

co-partnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions; and no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the partnership; as it renders it impossible for the firm to continue its business." So far then as a partner may bind his co-partners by instrument under seal, it seems to follow, that he could appoint an attorney who would be competent to execute the like powers by a sealed instrument.

But it is foreign from the object of these notes to dwell upon the law of partnership further than it is immediately connected with, or elucidates the subject of the work: still it may not be impertinent to refer to some further authorities which, although primarily arising out of matters of partnership, have a strong bearing upon the cognate topic of implied authority.—Although one partner has no authority generally to bind his co-partner by deed, yet if one partner executes a deed on behalf of the firm, in the presence of and with the consent of his co-partners, that will bind the firm; and under such circumstances, the sealing and delivery by one is deemed to be the act of all. *Ball v. Dunsterville*, 4 Term Rep. 313; *Darst v. Roth*, 4 Wash. C. C. Rep. 471; *Blood v. Goodrich*, 9 Wend. 76; *Halsey v. Whitney*, 4 Mas. 232; *Mackay v. Bloodgood*, 9 Johns. Rep. 285; *Anthony v. Butler*, 13 Peters, 423, 433. A partner may bind his co-partner by a contract under seal, made in the name and for the use of the firm in the course of the partnership business, provided the co-partner assents to the contract previously to its execution, and afterwards ratifies and adopts it; and this assent or adoption may be by parol. *Cady v. Shepherd*, 11 Pick. 400. And see *Skinner v. Dayton*, 19 Johns. Rep. 513. In one case, it has been held, that a partner may execute in the name of the firm an instrument under seal, necessary to the usual course of their business, which will be binding upon the firm, provided an authority for that purpose be previously communicated to him by the co-partner, and that this authority need not be by an instrument under seal, nor in writing, nor specially communicated for the specific purpose; but may be general, and inferred from the partnership itself, and from the subsequent conduct of the co-partner, implying an assent on his part to the act of the partner who executed the deed. *Iram v. Seton*, 2 Hall, 262. Mr. Justice Story has quoted, evidently with approbation, the opinion of Jones, C. J. in the above cited case. Story on Part. § 122, n. 1. On the other hand, it may fairly be presumed that the Ex-chancellor of New York considered that that decision had gone somewhat too far. 3 Kent's Comm. 48, n. c.

A partner cannot bind the others by a submission to arbitration, even of matters arising out of the business of the firm. *Stead v. Salt*, 3 Bing. 101;

authorized by deed *under seal.(*m*) It may be [*158] found laid down as a general rule, that a delegation of authority to do any act must be by deed ; but the rule so stated does not seem warranted either by the authorities, or by usage.(*n*)

Karthus v. Yllas y Ferrer, 1 Peters, 222 ; *McBride v. Hagan*, 1 Wend. 326. But where an award is made pursuant to a submission, under seal, executed by one partner in favor of the partnership, who afterwards accepts the amount awarded in favor of the partnership, and endorses a receipt in full on the award, it is sufficient to bar the co-partnership claim ; for it operates either as a release by one partner ; or as an accord and satisfaction. *Buchanan v. Curry*, 19 Johns. Rep. 137. It seems, that a warrant of attorney under seal, executed by one person for himself and partner in the absence of the latter, but with his consent is sufficient authority for signing judgment against both. *Brutton v. Burton*, 1 Chitty's Rep. 707. But the question in this case arose upon a motion to set aside the judgment, and of course was an application to the equity jurisdiction of the court, and not upon a formal issue of law or fact. Besides, the case is not very distinctly reported. And see *McCredie v. Senior*, 4 Paige, 378 ; *McKea v. Bank of Mount Pleasant*, 7 Ohio Rep. 187 ; *Waring v. Robinson*, 1 Hoff. Ch. Rep. 525, 530. Whether a partner may confess a judgment in an actually pending suit by executing a *cognovit*, &c. See *Waring v. Robinson*, ubi supra ; *Harper v. Fox*, 7 Watts & Serg. 172.

The general right of a partner to bind the partnership by a mercantile instrument, is restricted to commercial partnerships. So, where one of two attorneys in partnership gave a promissory note in the name of the firm, for a debt due by them, Lord Denman says ; " Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do ; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments ; nor is it necessary for the purposes of their business." *Hedley v. Bainbridge*, 3 Ad. & Ell. N. S. 316.

As to the power of one partner to bind his co-partners by writing not under seal, see post, p. 199, n. 9. He cannot bind the partnership by a tortious act, when not acting for the partnership, or for any partnership object, and for his own individual and separate purposes. *Ex parte Eyre*, 1 Phillips, 227, 238.

(*m*) *Horsley v. Rush and Telson*, Guildhall sittings after Mich. Term, 1788, cited 7 T. R. 209 ; and see 6 T. R. 177. So an authority to take or receive livery of seisin must be by deed. 2 Roll. Abr. (R) pl. 3, 4.

(*n*) Bac. Ab. tit. *Authority*, A. cites Co. Lit. 48, 6 ; 2 Roll. Abr. 8 ; Salk. 96 ; || see ante 1, n.||

‡ By the same rule it was decided, that a general authority, from one of several assignees of a bankrupt's estate, to the others to act for him and use his name, was not sufficient to enable the others to execute a release by *deed* ;(3) and in another case, that an action could not be maintained by the principal upon a covenant in an indenture executed on his behalf by an agent appointed by writing, but not under seal.(4)‡

[And though the principal acknowledge that he gave the agent authority yet the acknowledgment itself is not sufficient to prove it, without the production of an authority under seal.(5)]

(3) [*Williams v. Walsby*, 4 Esp. N. P. C. 220.]

(4) ‡ *Berkeley v. Hardy*, 5 B. & C. 355 ;‡ || post, 181, n. (s)¶

(5) [*Steiglitz v. Egginton*, 1 Holt, N. P. C. 141.] || But see *Cady v. Shepherd*, 11 Pick. 400, 406. See further, ante, 157, n. (l), and cases there cited. The decision in *Steiglitz v. Egginton*, was, however, sanctioned by Mr. Justice Sutherland in delivering the opinion of the Supreme Court of New York, in *Hanford v. McNair*, 9 Wend. 54, 56. He says : "If a deed executed by an agent under an express original parol authority would not be binding on the principal, it must necessarily follow that no subsequent parol acknowledgment, or acts *in pais*, can produce such effect. This was expressly held by Gibbs, C. J. in *Steiglitz v. Egginton*. That was debt upon an award made pursuant to a submission under seal, executed by one partner for himself and his co-partner. The plaintiff offered to prove that the partner who did not execute the deed, gave authority to the other to execute it for him, and that he had subsequently acknowledged the agreement. The Chief Justice said the authority to execute must be by deed. If one partner, who does not execute, acknowledge that he gave an authority to execute for him, it must be presumed to be a legal authority ; and that must be under seal and produced. One man cannot authorize another to execute a deed for him, except by deed. No subsequent acknowledgment will do." But it may be difficult to reconcile the above with a subsequent decision of the same court, where it was held, that a *parol acknowledgment* by a *principal* that an *agent* had authority *under seal* to enter into a *sealed contract* obligatory upon his principal is competent evidence of such authority. A distinction is made by the court, that if at the time of entering into a *sealed contract*, the agent had in fact *no authority under seal* to enter into the contract, the subsequent parol acknowledgment of authority, and ratification of the contract by the partner will not bind the principal. *Blood v. Goodrich*, 12 Wend. 525 ; S. C. 9 Wend. 68.¶

3. For the purposes described in the 1st, 2d, and 3d sections of the Statute of Frauds, that is for the purpose of *making* or *creating* leases, *estates, inte- [*159] rests of freehold, or terms for years, or any uncertain interest, other than leases under three years, in messuages, manors, lands, tenements, or hereditaments, by an agent, or for surrendering the same, (except copyhold interests,) the authority of the agent must, ‡ by the express words of the statute,‡ be in writing.(o) But for the purposes described by the fourth section, viz. “to charge executors or administrators out of their own estates; or to charge any for the debt or default of another; or upon an agreement in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement not to be performed within a year;” although the several agreements recited must be in writing, signed by the party or his agent thereunto by him lawfully authorized the *authority* is not required to be in writing.(A) And therefore the authority to contract for a lease or other interest in land need not be in writing, though the authority to sign the lease or instrument, by which the interest passes, must be so.(p) ‡ And purchases of land, &c., may be made, and commonly are made by agents not appointed by writing, as by an auctioneer, who, both at law and in equity, is *considered as the common agent [160] of the vendor and purchaser.(6)‡ Neither does the 17th section, relating to the sale of goods above 10*l.* which requires a note or memorandum in writing, signed by the parties to be charged, or their agents thereunto lawfully

(o) 29 Car. II. c. 3, s. 1, 2, 3.

(A) || 2 Kent's Comm. 614; post, 160, n. (q).||

(p) 5 Vin. Ab. 524; 9 Ves. 250; 10 Ves. 311. *Clinan v. Cooke*, 1 Sch. & Lef. 22, S. P.; || *Lawrence v. Taylor*, 5 Hill, 107.||

(6) ‡ *Emmerson v. Heelis*, 2 Taunt. 28; *Fairbrother v. Prattent*, 1 Dan. 67; *Kemey's v. Proctor*, 1 Jac. & W. 350. And see 3 Burr. 1921; 7 East, 567; 1 Campb. 513; 4 Taunt. 209. Post, Ch. III. p. 4, s. 3.‡

authorized, make it necessary that the authority should be in writing.(q)(7)

(q) 92 Car. II. c. 3, s. 17 ; and see post ; || p. 313 et seq. ; *Shaw v. Nudd*, 8 Pick. 9. The provisions of the Revised Statutes of New York, relating to the subject of the preceding paragraph, are mainly to the same effect as those of the statute of 29 Ch. II. They are as follows. "No estate or interest in lands, other than leases for a term *not exceeding one year*, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring, the same, or by his lawful agent, thereunto authorized by writing." R. S. part 2, ch. 7. tit. 1, § 6 ; vol. 2 (2d ed.) p. 59. "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party, by whom the lease or sale is to be made." Ibid. § 8 ; [see post, 315, n. (g).] "Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party lawfully authorized." Ibid. § 9. Such authority need not be in writing. *Mortimer v. Cornwell*, 1 Hoff. Ch. Rep. 351 ; *Botts v. Coxine*, id. 80 ; *Lawrence v. Taylor*, 5 Hill, 107, 112.

"No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized." R. S. part 2, ch. 6, tit. 5 § 1, vol. 2, p. 50.

"In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged therewith. 1. Every agreement that by its terms, is not to be performed within one year from the making thereof:—2. Every special promise to answer for the debt, default, or miscarriage of another person:—3. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry." R. S. part 2, ch. 7, tit. 2, § 2, vol. 2, p. 70. "Every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void, unless, 1. A note or memorandum of such contract, be made in writing and be subscribed by the parties to be charged thereby : or,—2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action ; or,—3. Unless the buyer shall at the time, pay some part of the purchase money." Ibid. § 3. "Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale enter in a sale book, a memoran-

dum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section." Ibid. § 4. "Every instrument required by any of the provisions of this title, to be subscribed by any party, may be subscribed by the lawful agent of such party." Ibid. § 8.

The construction of section 4 of the above statute came under consideration in *Hicks v. Whitmore*, 12 Wend. 548, and the subject is too important not to justify a somewhat enlarged statement.—It was an action to recover the difference between the first and second sales of a certain brig called the *Anna Maria*, sold at auction, which having been struck off to the defendant, he did not, as was alleged by the plaintiffs, comply with the terms of sale, in consequence of which there was a second sale, at which the brig was sold for a less amount, and it was sought to charge the defendant with the difference. The question was whether the auctioneer, on the occasion of the first sale proceeded in such a manner as to bind the defendant by his bid. The brig was sold at the Merchants Exchange in the city of New York, and the auctioneer testified, that it is customary to put down the bids upon paper, and that he made at the time a minute in pencil of the sums bid, and of the name of the highest bidder, but that the memorandum in pencil did not contain the names of the owners of the vessel, or of the person on whose account the sale was made; that from the minute in pencil he made a memorandum in his *sale book* thus: "Dec. 18, 1813, W. W. & E. Thompson, selling the brig *Anna Maria* to Swanton Whitmore for \$3150—terms, approved endorsed note at 6 months, \$10." The auctioneer further stated that the vessel was put up at auction at *two o'clock* P. M., that he was from fifteen to twenty minutes making the sale, and went immediately to his counting house in Wall Street, near Pearl Street, and made the entry in his book; that he has no doubt it was made before *three o'clock* P. M. A verdict was found for the plaintiffs subject to the opinion of the Supreme Court, which ordered a judgment of nonsuit. Savage, C. J. delivering the opinion of the court says: "The principal question is, whether the auctioneer made an entry in his sale book, in conformity with the statute. The fourth section of our statute of frauds is as follows, &c. &c.—The fourth section of the statute is new, and comes up now for the first time to receive a construction; and the question is, whether the memorandum made by the auctioneer is in compliance with the statute. The statute was no doubt made in reference to the law as it existed at the time, and was intended to remove all doubt or uncertainty, if any existed, as to the contents of the memorandum. It must be admitted that it had not been settled, with any degree of precision, what memorandum made by an auctioneer would be sufficient.—Our legislature have undertaken to specify what the memorandum shall contain; and we cannot err, I think, by requiring a strict compliance with the terms of the statute. The particulars are, 1. The nature and price of the property sold: this is done in the memorandum, by stating the sale of the brig *Anna Maria* for \$3150. 2. The terms of

the sale: this is complied with, by stating the sale to be for approved notes at six months. 3. The name of the purchaser: this was done by stating the sale of the brig Anna Maria to Swanton Whitmore. 4. The name of the person on whose account the sale is made: the expression here is somewhat peculiar. It is not the name of the vendor or owner, but of the person on whose account the sale is made, which may well be complied with, by inserting the name of the agent, factor, or consignee. From the phraseology used I infer, that the legislature intended it should not be necessary to insert the name of the real owner, but that it should be sufficient to insert the name of any person having legal authority to sell. If such is the meaning of the statute, then there has been a compliance with this requirement, as the names of two persons are inserted as vendors.—Other particulars respecting the memorandum are that it shall be entered in the *sale book* of the auctioneer, and *at the time of the sale*. The memorandum in this case was entered in the sale book of the auctioneer, and perhaps in that particular is a compliance; but it cannot escape notice, that this memorandum is a mere charge by the auctioneer against his employer, and seems to have been entered as such, and not as a record of the proceedings of a public agent. Much has been said in argument as to the time when the entry was made. A memorandum was made at the time of the sale, that is, as the biddings progressed, and when the property was struck off to the defendant, an entry of his name was made before the auctioneer proceeded to any other business; but no entry was made in the sale book, until the auctioneer left the Exchange, and went to his own counting-room. The memorandum made in pencil was clearly not a compliance with the statute, because it was not made in the sale book. The statute says, that certain contracts by *parol* shall be void, unless certain things are done. It is not enough that a memorandum shall be made, but it shall be entered in the sale book of the auctioneer—not in any other book, his day book, or his ledger, as such, but a book in which he enters his transactions of sales. I do not mean to say that he may not make his day book his sale book; but the legislature evidently intended that the auctioneer should keep a book called a sale book, which should contain an entry of his sales. The memorandum must also be entered *at the time of sale*. If these words are taken literally, they are perfectly clear and intelligible; but if we say, that the time of sale means one hour after the sale, we shall find ourselves legislating, and appointing a different time from that mentioned by the legislature. There is no more difficulty in the auctioneer making an entry in a book, than on a scrap of paper; and if he is so situated that he cannot write with ink, he can write with a pencil.—It shall be done *at the time*, that is, before any other business shall engross his attention; it shall be done at the consummation of the bargain, when no occurrence shall have happened to obliterate it from the memory. What was said by Lord Erskine in *Buckmaster v. Hanop*, 13 Ves. 471, about the auctioneer taking minutes and putting down initials to enable him afterwards to do the formal act, is not applicable here. That is what the legislature intended to prevent.” The above cited 4th section of the Revised Statutes of New York, vol. 2. (2d ed.) p. 70, leaves sales at

auction of real estate untouched. Therefore the sale at auction of lands or an interest therein, so far as regards the forms to be pursued by the auctioneer, is to be governed by previously established rules. See *McComb v. Wright*, 4 Johns. Ch. Rep. 659 ; post, 314, n. (2) ; *Brown v. Gilleland*, 2 Desau. 540 ; *Jenkins v. Hogg*, 2 Cons. Rep. S. Car. 821-835.||

(7) † For the purposes of the 4th and 17th sections, so far at least as relate to the sale of goods, any person who may fairly be considered as acting for the party in the transaction will sufficiently fill the character of an agent. Thus the memorandum of the broker, and the signature of an auctioneer to the catalogue of sale, are sufficient to make a contract binding ; the broker and auctioneer being looked upon as agents lawfully authorized by both parties, and therefore of course by the party to be charged. 15 East, 107 ; 2 Campb. 337 ; 1 Stark. 128 ; 6 B. & C. 117 ; and the cases cited supra. || The rule that a memorandum of a sale of goods made by an agent having merely parol authority satisfies the statute of frauds, means that he should be an auctioneer or broker, or other agent of both parties ; not the mere agent of the vendee, or the agent of either party singly ; e. g. a commission merchant authorized to buy goods in behalf of a distant correspondent. *Sewall v. Fitch*, 9 Cow. 215. So, where a buyer of goods (not at auction) requested D., the agent of the seller, to write a note of the contract, in the buyer's book ; and D. did so, and signed the note with his own name, it was held that such note was not a sufficient note, under the statute of frauds, to bind the buyer. *Vaughan, J.* " The plaintiffs' case fails in their not showing that D. was the defendant's agent. D. was agent for the plaintiffs, and the defendant in requesting him to make the entry in his book, probably sought to fix the plaintiffs, but not to appoint D. as agent for himself " *Coltman, J.* " It is not desirable to relax the provisions of the statute of frauds. I am not prepared to say that if D. had been the clerk of Musson [the defendant] his signing his own name would have been a sufficient memorandum of the bargain to satisfy the statute ; but D. is not the agent of Musson in any respect ; and though if he had signed the name of M., at M.'s request, the case might have fallen within the authority of *Bird v. Boulter*, (infra,) yet here where he signs his own name, he thereby only binds his employer." *Graham v. Musson*, 5 Bing. N. C. 603 ; *Graham v. Fretwell*, 3 Mann. & Gran. 368. See *Bird v. Boulter*, infra. The same construction of the statute, as to the appointment of agents by parol, applies equally to agents for the sale of lands or goods. *McComb v. Wright*. 4 Johns. Ch. Rep. 659 ; post, 314, n. 2.|| The agent must, however, be some third person. One of the contracting parties cannot constitute himself agent for the other, even with his consent and approbation. || Ante, 33, n. 3.|| And therefore in *Wright v. Dannah*, 2 Campb. 203, where the seller wrote the note by the direction and at the dictation of the buyer, it was held insufficient to charge him. And on the same principle, in *Farebrother v. Simmons*, 5 B. & A. 33, an auctioneer, who had made an entry of the purchase, was not considered to be an agent of the purchaser, so as to satisfy the statute, where the action for the breach of contract was brought in his own name. And see *Rayner v. Lin-*

An authority to accept, draw, or endorse a bill of
[*161] exchange in another person's name may be *by

thorn, 1 R. & M. 325; *Cooper v. Smith*, 15 East, 103. ¶ But in *assumpsit* by an auctioneer against a purchaser for goods sold, an entry in the sale book by the auctioneer's clerk, who attended the sale, and as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him made a note accordingly in the book, was held a memorandum in writing from an agent lawfully authorized within the 17th section of the statute of frauds. Denman, C. J. says: "I think this case is distinguishable from *Wright v. Dannah*, and *Farebrother v. Simmons*, [ubi supra,] and it appears to me that the clerk was not acting merely as an automaton, but as a person known to all engaged in the sale, and employed by any who told him to put down his name." Littledale, J. "With respect to the cases relied upon in support of the rule, [*nisi* for a nonsuit] there is certainly a difficulty in saying that a purchaser shall be bound by a contract or not, as the action is brought by one party or another. It is indeed irregular that the real buyer, or real seller, should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person the objection is removed. An auctioneer is enabled by law to sue the purchaser, but, according to the rule insisted upon for the defendant, an action of this kind could not be maintained by the auctioneer. I think that a clerk employed as Pitt was, in this case, must, in an action brought by the auctioneer, be considered as his agent for the purpose of taking down the names, and also as the agent of the several persons in the room for the same purpose, and to prevent the necessity of each purchaser coming to the table to make the entry for himself." Taunton, J. "Under the circumstances, I think Pitt may be considered to have been the agent of the vendor. It is not necessary to suppose that the vendor reposed a particular confidence in the auctioneer for the purpose of putting down the names in the sale book. He may be taken to have constituted that person his agent for the making of such entries, whom the auctioneer might choose to appoint. If so, Pitt was agent for the vendor, and also for the persons in the room who saw him acting as he did, under the auctioneer, and by their acquiescence constituted him their agent for the business which they saw him performing. At all events he is a third person, and not a contracting party on the record." Patteson, J. "It is not necessary here to overrule *Farebrother v. Simmons*. It may be correct to say, as there laid down, that the signature must be by a third person, and not by a contracting party on the record. Here it was so. According to the evidence, Pitt was seen by all the parties at the sale making the entries in the sale book: it was inconvenient that each purchaser should come to the table for that purpose, and, by nodding as the names were called, they authorized him to act as he did." *Bird v. Boulter*, 4 Barn. & Ad. 443. And see *Graham v. Musson*, supra.¶

parol :(*r*) and the statute 3 and 4 Anne, c. 9, which makes promissory notes assignable, speaks of such as are made and signed by any person, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader, *who is usually entrusted by him*, her, or them, to sign such promissory notes ; from which it may be inferred that the legislature looked rather to the fact of employment, than to the manner in which the authority was constituted.

In commercial affairs agents are most usually commissioned by a letter of orders, or simply by a retainer.(*A*)

SECTION 2.

Implied Authority:

1. An authority, however, may not only be expressly created by the modes above mentioned, but may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name ; ¶ and from the nature of the employment.(*B*)¶ As the law of master and servant is the basis of this branch of the law of agency, it may be proper to refer to that source for authorities. And though employment be [*is*] sometimes considered only as evidence of an *authority, it may, perhaps, [*162] be properly regarded as the authority itself ; upon a general principle of justice, that he who accredits another by employing him, must abide by the effect of that credit.(*C*) Thus, if a servant have been allowed by his mas-

(*r*) Per Holt, C. J. 12 Mod. 564.

(*A*) ¶ Ante, p. 2, n. (*c*) ; p. 157, n. (*l*)¶

(*B*) ¶ *Richardson v. Cartwright*, 1 Carr & Kirwan, 328 ; post, 169, 197.¶

(*C*) ¶ Rolfe, B. says : " An authority to sell may be either express, as

ter to buy upon credit, the latter is answerable for what is bought by that servant, though without his authority. The rule is thus laid down by Lord C. J. Holt: (a) "If a man send his servant *with ready money* to buy goods, and the servant buy upon credit, the master is not chargeable. But if the servant usually buy for the master upon tick, (1) and the servant buy some things without the master's order, yet if the master were trusted by the trader, he is liable." (b) So if a servant, usually employed to pledge goods or borrow money, pledge his master's goods for money, the lender may maintain an action of debt for it against the master. (c) *One instance* in which the servant's authority to buy upon credit was recognized, was held sufficient to charge the master, as follows: the defendant, who was a dealer in iron, and known by the plaintiff to be so, though they never before had any dealings together, sent a [*163] waterman to *the plaintiff for iron on trust, and paid for it afterwards. He sent the same man again with ready money, who received the goods, but did not pay for them; and it was ruled that the sending him upon

when an actual order to sell is given; or it may arise from ordinary usage, as in the case of a servant in a shop, or market, or where the master has been in the habit of sending his servant to sell at a particular place." Therefore, where a servant was sent to sell cattle in *market overt*, his authority was construed not to be a continuing authority to sell elsewhere. *Metcalf v. Lumsden*, 1 Carr. & Kir. 309.¶

(a) Show, 95; ¶ *Jaques v. Todd*, 3 Wend. 94.¶

(1) † Assuming of course that the master has authorized or adopted such a course of dealing.†

(b) See also 3 Keb. 625; 10 Mod. 111. ¶ In an action against the defendant for the amount of a quantity of brandy alleged to have been sold and delivered to him, it appeared in evidence, that the brandy had been ordered by the butler of the defendant, in the name of the latter, and that it had been delivered accordingly, and had been consumed by the butler and the cook; and that the defendant had not been privy to the order, delivery, or consumption. Lord Ellenborough; If the defendant had been in the habit of paying for goods ordered by his butler, he would be bound: but we must give up house-keeping, if such evidence as this were sufficient to bind a master. Verdict for the defendant. *Maunder v. Conyers*, 2 Starkie, 281.¶

(c) 12 Mod. 564.

trust the first time was giving him credit, so as to charge the defendant upon a second contract.(d)(2)

So a bill or note drawn by a clerk, who is allowed to issue notes, will bind the master though the money never come to his use.(e)(3) *But without any [*164]

(d) *Hazard v. Treadwell*, 1 Str. 506. || Can this case be law? Can a single instance of recognition be sufficient to bind the principal or master? *Supra*, n. (2); post, p. 169.||

(2) † See *Todd v. Robinson*, Ry. & M. 217; *Gilman v. Robinson*, ib. 226. In both these cases, however, there had been frequent dealings on credit through the agent, expressly recognized by the principal, and in the latter case Best, C. J. seems to have doubted whether a single instance of recognition by payment would suffice. The question would be, whether from such a recognition a tradesman would be justified in inferring a *general* authority from the principal to the agent to deal for him on credit in respect of the same description of goods, and a jury would be very likely to say, that he was so justified, and that if loss occurred, it ought to fall on the employer for having induced him to suppose the existence of such an authority.‡

(3) † And so it is in the case of partners, the rights and liabilities of whom are governed by the same rules as are the relations of principal and agent, each partner being considered, in all which relates to partnership business, the agent of the rest. The same questions, therefore, of express and implied, general and special authority, are continually arising among them, and must be determined on the same principles as those which are here laid down. Indeed the law of partnership is but a branch of that of principal and agent, and might have been fitly introduced into this treatise; but as it did not enter into the design of the original author, it has been thought better merely to refer to it generally.‡ || Some points touching the law of partnership, so far as connected with the subject of agency, are introduced by the editor. Ante, p. 157 n. (L)||

(e) *Boulton v. Arliden*, 1 Salk. 234; ||post, 169.|| In this manner the acts of the wife, supported by evidence of the husband's assent to other acts of the same nature, and in the same business, may bind him. || *Cox v. Hoffman*, 4 Dev. & Bat. (N. Car.) Law Rep. 180.|| Thus a wife, in the absence of, and unknown to her husband, contracted for the board of his daughter, aged seventeen, who, after some time, was removed by her to another situation. In an action by the person with whom she was last placed, it was proved that the husband had paid for the first board, though he expressed some disapprobation of it; and it was held, that he had thereby so far acknowledged the discretionary power to contract for this purpose, as to make him liable to the plaintiff upon the second contract. *Forsyth v. Milne*, Sittings after M. T. 1808, Gd. Hall, B. R.

previous dealing upon credit sanctioned by the master,

[So where the wife alone transacted the husband's business, and purchased all the articles used in his trade, her admission, as to the state of the accounts between the person who has supplied goods to her to be used in the trade, and her husband, was held to be evidence against the latter. *Anderson v. Sanderson*, 2 Stark. N. P. C. 204.] + And see 1 Campb. 121; 3 B. & C. 631; + || *Taylor v. Green*, 8 Carr. & Payne, 316; *Filmer v. Lynn*, 4 Nev. & Mann. 559. A wife may act as agent of her husband; and a subsequent acknowledgment or ratification of her acts by the husband is evidence of, and equivalent to an original authority. *Hopkins v. Mollinieux*, 4 Wend. 465. It is competent to a jury to infer agency in a wife, to accept a notice with respect to a particular transaction in her husband's trade, from her being seen twice in the counting house, appearing to conduct his business with reference to the transaction in question, and on these occasions giving directions to the foreman. *Plimmer v. Sells*, 3 Nev. & Mann. 422. And when a wife admitted, that she had agreed to pay 4s. per week for nursing a child, it was held sufficient to charge the husband, it being a matter usually transacted by women. Anon. Str. 527. As to matters concerning the internal regulation of the household, such as the hiring of servants, the procuring of provisions and other necessities for the family, the purchase of necessary apparel for herself and children, and the performing whatever other duties usually devolve upon the female head of a family, the wife is *prima facie* to be deemed the agent of the husband, and in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband,) ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never could have authorized, that will alone be sufficient to repel the inference of agency. And if it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers from her separate funds, also goes to prove that the wife was not acting as the agent of the husband: and the fact that the husband sold some of the goods which were supplied to the wife, and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband. *Freestone v. Butcher*, 9 Carr. & Payne, 643. In a later case, in the Court of Exchequer, it was held, that the liability of a husband for goods supplied to his wife depends upon whether she is his agent for the purpose of binding him by contracts for goods supplied to her, which is a question for the jury to determine upon the facts

a party who trusts a servant does it at his own peril,(A) and can only resort to the servant's responsibility, and the master is only liable for so much as comes to his use ;(f) and not even for that, if he gave the servant money beforehand to pay for it.(g) A rule laid down by Lord Kenyon is, that where a man gives his servant money to pay for commodities as he buys them, if the servant appropriate that money, the master will not be liable ; but if the *master employ the servant to buy things upon [*165] credit, he will be liable to whatever extent the servant pledges his credit. And in the case then in question, where the mode of dealing was for the master to give money to pay for the articles, as bought, to the servant, who used to pay it over whenever it amounted to a certain small sum, it was held that the tradesman, having suffered the account to run to a considerable arrear, could not recover

of the case ; and in determining that question the extravagant nature of her orders, is a matter to be taken into consideration, as showing she had no such authority. Parke, B. there says : " There may be a trifling inaccuracy in the report in the case of *Freestone v. Butcher*, (ubi supra,) in stating that the extravagance of the bill would *alone* repel the inference of agency : that alone, perhaps, would not be sufficient ; but it may be repelled by that and other circumstances together. The law as there laid down is substantially correct. The whole turns upon the question of the husband's authority ; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff who supplied her with these articles must have known that she was exceeding her husband's authority to pledge his credit. If he had any doubts upon the subject, he might have made inquiries of the husband." *Lane v. Ironmonger*, 13 Mees. & Wels. 368. In the somewhat analogous case of supplies furnished to an infant, where the jury had found for the plaintiffs nearly the whole amount of their account against the infant—an account as to which, Gibson, C. J. might well say : " Such a bill makes one shudder,"—a new trial was granted by the Supreme Court of Pennsylvania ; the Chief Justice observing that " where the supply has been so grossly profuse as to shock the sense, it is the duty of the judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary." *Johnson v. Lines*, 6 Watts & Serg. 80.||

(A) || Ante, 162, n. (b)||

(f) *Pearce v. Rogers*, 3 Esp. Cas. 214 ; and see 4 Esp. 174.

(g) 1 Salk. 234. See next page.

against the master ; for that by departing from the usual mode of dealing, he had trusted the servant and not the master.(h)

But the fact of articles purchased having come to the use of the master is *prima facie* sufficient to make him liable, and he can only discharge himself either by showing, as in the instance just mentioned, that the credit was really given to the servant, or that he always gave the servant ready money to pay for the articles bought, and had not, therefore, authorized him to buy upon [*166] *credit. But the latter ground is an excuse only in cases where the master gives the servant money to go to market with. For if he have assented to his dealing upon credit at all, he will be liable for his contracts, notwithstanding he may afterwards furnish money to the servant, which the latter neglects to pay over. In *Sir Robert Weyland's case*, he gave his servant money every Saturday to discharge the expenses of the week ; the servant did not pay the money due for several weeks together, though he received it regularly each week, and the seller recovered.(i) The principle of that case is recognized in the following, which affords a clear rule upon this subject. The action was for the price of hay and straw sold by the plaintiff for the use of the defendant's horses. The delivery at the defendant's of the articles, and also of bills of parcels, was proved ; but the plaintiff never saw the defendant, nor received any orders or payments directly from him. The defendant's manner was to keep a book with

(h) *Stubbing v. Heintz*, Peake, Ni. Pri. 48. A rule somewhat different is stated in another case, where it is said to have been resolved by Holt, C. J. that where the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys upon tick, yet the master is liable so as the goods come to his use otherwise not. *Boulton v. Arlson*, 3 Salk. 234. However, the report of the same case, 1 Lord Raym. 225, does not support this statement ; and is consistent with the rule as mentioned in the text. It is indeed there said to have been so adjudged in *Stowel's case*, but that Holt, C. J. doubted that resolution.

(i) *Sir Robert Weyland's case*, 3 Salk. 234 : 1 Ld. Raym. 225.

the servant (his coachman) by whom the goods were ordered, in which the articles procured by, and the sums advanced to him, were entered ; but the advances were not specifically for the articles bought, but made generally from time to time. Lord Ellenborough, " If the goods were taken up, and the money *given after- [*167] wards to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money, for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit ; but if the servant were not so in cash, he gave him a right to take up the goods on credit ; and I think he will be liable, as the servant has not paid the plaintiff, though he may have received the money from the defendant his master." And there was a verdict accordingly for the plaintiff.(k)

‡ The same rules which have been here laid down as to the authority of a servant, will be found equally applicable to that of an agent. Thus, a broker employed to purchase has no authority, as broker merely, to sell for his principal. But if the principal has allowed him to clothe himself with the apparent ownership, or has given him the power of disposition, he cannot afterwards reclaim the goods from a person, to whom the broker has made an unauthorized sale of them. Accordingly where the principal had himself transferred hemp in the wharfinger's book into the name of the broker through whom *he had bought, [*168] and whose ordinary business it was to buy and sell hemp ; it was held, that he could not recover it back from the person to whom the broker had sold it. " It cannot fairly be questioned," said Lord Ellenborough, " in this case but that Swallow [the broker] had an implied authority to sell. Strangers can only look to the acts of

(k) *Rusby v. Scarlett*, 5 Esp. Cas. 76.

the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker : and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject matter ; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale."

"When the commodity is sent in such a way and to such a place [*169] as to exhibit an apparent *purpose of sale, the principal will be bound and the purchaser safe."(4)

Whether the circumstances are sufficient to warrant the inference of such an authority, it is the province of the jury to decide.(5)†

A master may also be liable on a note given by his clerk

(4) † *Pickering v. Busk*, 15 East, 38 ; and see *Townsend v. Inglis*, Holt's N. P. C. 278 ; and *Whitehead v. Tuckett*, 15 East, 400, post.† || 199, n. 9. *Saltus v. Everett*, 20 Wend. 267 ; *Loddell v. Baker*, 1 Metc. 202.||

(5) † *Dyer v. Pearson*, 3 B. & C. 38.† || Where both the parties had agreed that A. B. a broker, should manage a sale between them, for which they were in treaty, and the vendee some days after, informed A. B. that he had made the bargain, and desired him to put down the terms, which A. B. accordingly did, and then sent a sale note to vendor, and the vendor did not return the note, but in a conversation with A. B. some days afterwards, regretted that she had sold the goods :—it was held to be evidence to the jury of authority from the vendor to A. B. *Chapman v. Partridge*, 5 Esp. Rep. 256 ; Russ. on Factors, 66 ; *Filmer v. Lynn*, 4 Nev. & Mann 559.||

or servant, though without authority, if the money be actually and *bona fide* applied to his use.(1) (6)

‡ An authority to draw, accept, or endorse bills, may also be presumed from acts of recognition in former instances.(A) And, therefore, where the person whose name appeared on the bill as acceptor refused to pay, on the ground that the acceptance was a forgery, it was held, that proof of payments by him on other occasions in respect of acceptances given by the same party in his name, was a sufficient answer to the defence.(7) *And in one case [*170]

(1) 1 *Ld. Raym.* 225 ; but see *Kilgour v. Finlayson*, 1 *H. B.* 156.

(6) ‡ This proposition was certainly laid down by Holt, C. J. but surely much too broadly—at least, the master's knowledge of the appropriation should be shown, and even then it is more than doubtful whether an authority to sign a note (not being in the ordinary course of the employment of the clerk or servant) could be inferred from that circumstance alone.‡
 ¶ Employment as a merchant's clerk does not imply an authority to sign notes in the name of the principal. *Terry v. Fargo*, 10 *Johns. Rep.* 114. It is competent for one partner to authorize a clerk to accept bills, and sign or endorse notes in the name of the company. *Tillier v. Whitehead*, 1 *Dallas*, 269. An agent has no right without the authority of his principal, to overdraw a banking account ; but if it appear that the agent has done so with the knowledge of his principal, the jury will be warranted in inferring from this, that the agent had, in fact, the requisite authority. *Pott v. Bevan*, 1 *Carr & Kirwan*, 335.¶

(A) ¶ *Commercial Bank of Lake Erie v. Norton*, 1 *Hill*, 501 ; *Emerson v. The Providence Hat Manufacturing Co.*, 12 *Mass. Rep.* 243.¶

(7) ‡ *Barber v. Gingell*, 3 *Esp. N. P. C.* 60 ; and see *Haughton v. Ewbank*, 4 *Campb.* 188.‡
 ¶ In *assumpsit* on two bills of exchange endorsed to the plaintiff in the name of the defendants by L. Johnson, the plaintiff in order to show that Johnson had authority to endorse for the defendants, proved that he was their confidential clerk, and had been introduced by them to their bankers, as one to whom they were to pay the same attention as to themselves : that the defendants had in repeated instances recognized his authority to draw both bills and checks by procuration for them : and that on three occasions Johnson had endorsed bills by procuration for them, on one of which occasions, at least, the defendants must have known of the endorsement ; and upon the other two, the bills had been discounted by a bill-broker at the defendants' bankers, and the defendants had drawn out the money raised upon the bills. The court refused to set aside a verdict for the plaintiff, and Tindal, C. J. in delivering their opinion said :
 "The evidence given to prove Johnson's authority to endorse bills for the

Lord Ellenborough held the defendant bound by a *guar-*

defendants was, first, that he was the confidential clerk of the defendants, and had been expressly introduced by them to their bankers, as one to whom they were to pay the same attention as they would to the defendants themselves. Secondly, evidence was given that they had, in repeated instances, recognized his authority to draw both bills and checks by procuration for them; bills being produced which were so drawn by him, and which afterwards bore the endorsement of the partners, and very numerous checks, about twenty in number, having been signed by him, in his own name, by procuration of the defendants; such checks being signed at the plaintiff's banking-house for Messrs. Flinn & Co., [the defendants,] but which checks it appeared were afterwards paid into the defendants' own bankers, so that the defendants may be presumed to have had an opportunity of seeing how their name was used. The plaintiff, lastly, proved, that on three occasions Johnson had endorsed bills of exchange by procuration for them: on one of which occasions, at least, the defendants must have known of such endorsement, inasmuch as after the special endorsement by him as agent of the firm to one of the partners, the bill bore the subsequent endorsement of that partner; in the other two instances, there was certainly no such knowledge brought home to the defendants; but the bills had been discounted by a bill-broker at the defendants' bankers, and the defendants had drawn out the money raised upon the bills. Now, it is contended, that the two first heads of evidence proved no authority to endorse, but that, at the utmost, according to the distinction laid down in *Robinson v. Yarrow*, [7 Taunt. 454, and see *infra*,] they proved an authority to draw; and, again, it was contended, that from the particular circumstances under which the checks were drawn, they were, in reality, receipts for money paid by the plaintiff, rather than checks, and entitled to little weight upon the question. And, further, as to the instances of endorsement by Johnson, it is argued that the single instance of the special endorsement of the bill, to the order of one of the partners, by no means imported a general authority to endorse bills, as the power over the proceeds of the bill was never parted with by the owners; and that, in the other two cases, the defendants at this very time dispute their liability to pay their bankers, on the ground of the want of authority in Johnson to endorse by procuration for them. But it has not been contended, as indeed it could not, that any part of the evidence was improper to be laid before the jury, in determining whether the clerk had authority to endorse or not.—It may be admitted, that an authority to draw, does not import in itself an authority to endorse bills; but still the evidence of such authority to draw, is not to be withheld from the jury, who are to determine on the whole of the evidence, whether such authority to endorse exists or not. The jury, although they may require some direct testimony upon the authority of the clerk to endorse, may justly be satisfied with less evidence, where it is proved that the clerk is a confidential clerk, and that

antee signed by his son, a minor of sixteen, on proof that

he has an undisputed authority to draw in the name of the principals. And as well this part of the evidence, as also the direct evidence of authority to endorse, was left to the jury, with those remarks in favor of the defendants which are now urged, and almost in the precise terms now used by the defendant's counsel. When, therefore, the evidence on this subject was left to a special jury of merchants, who have a right to bring their own knowledge of the general course of business in aid of their judgment on the particular occasion, and they have declared themselves satisfied that the defendants have, by their conduct, shown that this clerk had authority to endorse, with what object could we send this cause to a second trial before a jury of a similar description, where the very same question must again be left to the new jury upon the same evidence?" *Prescott v. Flinn*, 9 Bing. 19. In *Robinson v. Yarrow*, cited in the foregoing decision, it was held that the acceptance of a bill drawn by procuration admits the drawer's handwriting, and the procuration to draw; but though the bill is endorsed by the same procuration, the date thereof not appearing, the acceptance does not admit the procuration to endorse. Park, J. said: "The mere acceptance proves the drawing, but it never proves the endorsement: it is not at all necessary that a power to draw bills by procuration should enable the agent to endorse by procuration: the first is a power to get funds into the agent's hands, the other to pay them out."—"It is not necessary, in order to constitute a general agent, that he should before have done an act the same in specie with that in question. If he have usually done things of the same general character and effect with the assent of his principals, that is enough." Cowen, J. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 504.

The plaintiffs being applied to by one Allen, assuming to act on behalf of the defendant, for goods on his credit, and for his use, refused to deliver them without a written authority from the defendant. Allen afterwards produced a writing purporting to be such an authority, and received the goods upon the strength of it. The order however was forged and the goods never came to the defendant's use. In an action for the price of the goods the plaintiff was permitted to prove Allen the general agent of the defendant, and that the latter had frequently paid for goods taken up by Allen on the credit and for the use of the defendant. The court sustained a verdict for the plaintiffs. Parker, C. J. "The jury have found, upon satisfactory evidence, that Allen was the general agent of the defendant for the purchase of goods for the store at Bridgewater. This fact would entitle the plaintiffs to recover, notwithstanding the goods were never received by the defendant; which is another fact found by the jury. For it is very clear, that the party who employs the agent is answerable for his fidelity; and is liable for any loss occasioned by his fraud, while in the service of his principal. But there is another fact in the case,—viz. that the plaintiffs were unwilling to trust to Allen's representations, and refused to deliver the

he had occasionally signed his father's name, and accepted bills for him.(8) It may be doubtful, however, whether in

goods, unless he produced a written order or authority from the defendant, to purchase the goods on his account. Allen then produced a paper giving him the necessary authority, purporting to be signed by the defendant. But it was not in fact signed by him ; his name having been forged by Allen.—The point upon which the counsel for the defendant insisted is, that as the goods were not delivered upon the representation of Allen, or upon any knowledge that he was the defendant's agent, but entirely on the faith of the written authority, the plaintiffs had no right, finding that fail, to go into other evidence of Allen's general agency ; especially into the proof of facts, which although existing at the time the sale was made, were unknown to the plaintiffs, and, therefore, could not have been a consideration or inducement for them to sell. The cause was argued upon this point. But no authorities were cited, which appear to have a bearing upon it, and none have been since found ; so that the decision must rest rather upon general principles than authority. One thing is certain, viz. that the plaintiffs intended to sell these goods to the defendant, and not to Allen. They insisted upon evidence of authority, and they immediately charged the goods to the defendant.—Another thing seems to be clear, that Allen had authority to purchase ; and that, if the plaintiffs had been content with his assertion of authority, there would be no difficulty in the way of their recovering. They might have trusted to his word ; and if the defendant afterwards denied the agency, they might have gone into all the evidence used in the case, and from that established the fact of authority. How then can it make any difference that the false paper was before them, and that they placed confidence in it, rather than in the declarations of Allen to the same fact ? They trusted to the fact of authority, rather than to the evidence of it. Suppose, that finding the paper was forged, they had at the trial produced another paper which was genuine, or a letter authorizing the purchase of these goods ; would they be precluded from producing this, because another paper, purporting to prove the same fact, was found to be false ? Suppose at the trial they had discovered and produced to the jury a letter of attorney not known to them before ; would the use of it be denied, because they might have relied upon the declarations of Allen, or upon a paper forged by him ?—The fact to be established was, that the defendant made the purchase through the agency of Allen, and that the plaintiffs believed that they sold to the defendant, and did not trust Allen. It is certainly immaterial, whether their belief was founded on sufficient or insufficient evidence ; provided the fact on which they relied, turned out to be true, and could be proved by competent evidence to the jury.—In short, we see no difficulty in this case, except the apparent hardship of it upon the defendant." *Williams v. Mitchell*, 17 Mass. Rep. 98.¶

(8) + *Watkins v. Vince*, 2 Stark. 368.†

this last case some further evidence of authority should not have been given.†(A)

(A) ¶ There is an important class of agents who, from the nature of their employment are vested with an implied authority to a large extent ; these are the masters of merchant vessels. The author has not thought proper to enter into a discussion of this branch of the law of agency. The editor pursuing the course adopted by Mr. Lloyd, (ante, p. 164, n. 3,) in not introducing the law of partnership into this treatise will not enlarge upon this division of the subject ; yet it may not be improper to notice some points either of general utility, or as bearing upon the subjects handled by the author.—The master of a ship has an implied authority from the owners to contract for labor and supplies, which may be necessary to the safe prosecution of the voyage ; and for this purpose he may hypothecate the vessel in a foreign port ; and, having power to hypothecate, he may bind the owners personally instead of hypothecating. *James v. Bixby*, 11 Mass. Rep. 36 ; *Hussey v. Allen*, 6 Mass. Rep. 165 ; *The United Ins. Co. v. Scott*, 1 Johns. Rep. 111 ; *The American Ins. Co. v. Coster*, 3 Paige, 323. This authority is not confined to such supplies and repairs as are absolutely, or indispensably necessary ; but includes all such as are reasonably fit and proper for the ship and the voyage. *The Ship Fortitude*, 3 Sumn. 228. It extends to such as the owner, if a prudent man, would himself have ordered had he been present at the time. *Webster v. Seekamp*, 4 Barn. & Ald. 352. But if he has sufficient money of the owners, he cannot borrow on bottomry. *The Ship Packet*, 3 Mason, 255. In case of necessity, the master has the right even to sell or hypothecate the cargo, or part of it ; in which respect he becomes *ex necessitate*, the agent of the owners of the cargo. Ibid. *The United Ins. Co. v. Scott*, 1 Johns. Rep. 115. The master may sell a stranded ship in a case of extreme necessity, and acting in good faith and with sound discretion. *New England Ins. Co. v. The Sarah Ann*, 13 Peters, 387.

The implied authority of the master is not entirely restricted to transactions in a foreign port. There are many acts, in the home port, which are so invariably confided to the master, as to amount to an almost positive delegation of authority. Thus, the master is ordinarily entrusted with the authority of shipping the officers and crew ; of superintending the ordinary outfits, equipments, repairs, and other preparations of the vessel for the voyage ; of lading and unlading the cargo, and, in cases of a general ship, of receiving goods on board on freight, and of signing bills of lading for the same. Story's Ag. § 119. Whether the master may, at the home port, make a general contract for the affreightment of the vessel, see *The Schooner Tribune*, 3 Sumn. 144. In a home port, as well as a foreign one, the master has implied authority to borrow money for the necessary use of the ship, if the owner is absent, and no communication can be had without prejudice and delay. *Johns v. Simons*, 2 Ad. & Ell. N. S. 425. In the

2. The implied authority arising from employment continues after the agency has ceased, unless the parties giving

last cited case, Patteson, J. said: "I held in *Arthur v. Barton*, (6 Mees. & Wels. 138,) that to justify the master in borrowing, it is not necessary that the occasion should arise in a foreign country: but the case must be one where the occasion is pressing, and the master and owner cannot communicate without very great prejudice and delay. I took upon myself in that case to say, that if the money was really wanted for the use of the vessel, the master was authorized to borrow it; and the Court of Exchequer confirmed my ruling. I put the case upon the difficulty of communication." In *Stonehouse v. Gent*, Id. 431, n. b. the rule was admitted, but not applied, because there did not appear to be an insuperable difficulty of communication.

It has been hinted, that the master may, under circumstances of necessity, become the agent of the owners of the cargo. So, Kent, Ch. says: "It is understood to be the duty of the master, when his vessel is disabled in the course of the voyage, to procure another, if he can, and take on the cargo. This duty arises from the character of agent for the owner of the cargo, which is cast upon him from the necessity of the case; and in that character he is bound to act for the best interest of all concerned. His acts, in the execution of such a trust, and in relation to the property under his care, ought to be valid and binding upon the property, except in cases where his power is limited by positive rules." *Searle v. Scovell*, 4 Johns. Ch. Rep. 222. The general rule as to the implied authority of the master, in relation to the owners both of ship, and cargo, and others interested in the subject, is perspicuously stated by Sewall, J., as follows: "The master of the vessel becomes of necessity an authorized agent for the owners, freighters, insurers and all concerned, when the progress of the voyage is interrupted in a foreign port, either by a capture as prize, or by other detentions and casualties: and whatever he undertakes, and whatever expenses he may incur, fairly directed to the benefit of all concerned; these become a charge upon them respectively, and as the case may be, as much as when incurred under a special authority and license, or pursuant to an immediate request. The request and authority are necessarily implied, when the master exercises his discretion and judgment fairly. When his determination and proceedings are within any usual course of business, as in the event of sea damage when he provides suitable repairs necessary for the prosecution of the voyage, the expense may be more readily acquiesced in: but the case is not stronger than a provision fairly made in a case of unusual and unforeseen casualties. If in fact there is no direct request or authority in the one case, neither is there in the other. It arises in both cases, and is implied from the authority and duty of the master, which enable him to engage the personal responsibility of his employers, and of those by whom the master of a vessel on freight is entrusted, on every oc-

credit to it either may be supposed to have had notice of the change, or from length of time or other circumstances ought not to have inferred that it continued.(A) A servant had power to draw bills in his master's name, and was afterwards turned out of his service; and it was ruled, "that if he draw a bill in so little a time that the world cannot take notice of his being out of service; or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it; the bill in those cases shall bind the master."(m) Thus, also, a servant of Sir Robert Clayton, who had been used to receive and pay money, took up two hundred guineas after he had quitted the service; and the lender recovered against Sir R. Clayton, by the direction of Keeling, C. J. which was approved

casion where his discretion is necessarily exercised to secure the purposes of the voyage." *Douglas v. Moody*, 9 Mass. Rep. 551; and see *Saltus v. Everett*, 20 Wend. 268, 284, 285.

The master may also act in a double capacity, both as master, and as supercargo, or consignee of the goods laden on board; and the latter circumstance cannot alter his acts as master, the two characters being distinct. *Kendrick v. Delafield*, 2 Caines' Rep. 72. "But when the character of supercargo is superadded upon that of master, the person in whom those characters are united, stands in the relation of agent to two distinct principals at the same time. To these principals he owes distinct duties, according to the nature of the business in which they have employed him; for a breach of these duties he is directly responsible to them; and they are separately liable for the injurious consequences of his misconduct in those things which respect his peculiar duties to them. In the navigation of the ship, in the storage of the cargo, in the loading and unloading of it, and, generally speaking, in the conveying and safe keeping of it, he acts as master and representative of the ship owner, who is responsible for his negligence or torts in that character. But where the goods are consigned to the master, and are sold by him at the port of delivery, in this he acts as agent of the shipper. Upon the arrival of the ship at her port of destination, he delivers the cargo as master, and receives it as consignee. All his authority as master is then determined, as is also the responsibility of the ship owner, who will not be answerable for any negligence or fraud of which he may be guilty in the sale and disposition of the cargo consigned to him." 2 Liv. Pr. & Ag. 214, 215; *Williams v. Nichols*, 13 Wend. 58, 60.¶

(A) ¶ Post, 188.¶

(m) 12 Mod. 346; — v. *Harrison*, Moll. 107.

[*171] *by the whole Court on a motion for a new trial.(n)(9)

3. As an authority may be presumed from previous employment in similar acts, so the same presumption arises from subsequent acts of assent or acquiescence;(o) and a

(n) Moll. 282; 10 Mod. 111.

(9) † It is suggested, therefore, by Mr. Chitty in his *Treatise on Bills*, that in the case of a mercantile agent it will be prudent to give notice in the Gazette and by circulars of the determination of his employment.‡

(o) *Ward v. Evans*, Salk. 442; Comb. 450; 2 Ld. Raym. 930; ¶ ante, 31, 113, et seq. Such adoptive authority relates back to the time of the original transaction, and is deemed in law the same to all purposes as if it had been given before. *Lawrence v. Taylor*, 5 Hill, 107, 113. The doctrine on this subject is stated, as usual, with clearness and precision in Liv. Pr. & Ag. vol. 1, p. 44, et seq. The author says: "If I make a contract in the name of a person, who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if, with full knowledge of what I have done, he ratify the act, he will be considered to have contracted originally by my agency; for the ratification is equivalent to an original authority, according to the maxim that *omnis ratihabitio mandato æquiparatur*. The effect of a ratification is also to subject the principal to the same obligations to his agent, as if the latter had been expressly employed to do the business." [Ante, 4, 114.] "It is not necessary that there should be an express act of ratification, in order to oblige the principal to the performance of the contract, or to subject him to the obligation of indemnifying his agent; but his subsequent assent may be inferred from circumstances, which the law considers equivalent to an express ratification."—"Another effect of ratification is to discharge the agent from the responsibility to his principal, which he has incurred by improper management of the business entrusted to him, or by disobedience of orders." Again, vol. 1, p. 391: "We have seen in a former chapter that the subsequent assent of the principal will confirm the unauthorized acts of the agent, so that the former will be bound by them in respect to third persons. The same rule applies to the agent's responsibility. He will be released from any claim against him for damages by any act of his principal which amounts to a confirmation of what has been done." And see *Willinks v. Hollingsworth*, 6 Wheat. 79; *London and Birmingham Railway Co. v. Winter*, Cr. & Ph. 57; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Towle v. Stevenson*, 1 Johns. Cas. 110; *Randal v. Van Vechten*, 19 Johns. Rep. 60; *Skinner v. Dayton*, id. 554; *Rogers v. Kneeland*, 13 Wend. 114; S. C. 10 Wend. 219; *Loraine v. Cartwright*, 3 Wash. C. C. Rep. 154; *Cushman v. Loker*, 2 Mass. Rep. 106; *Frothingham v. Haley*, 3 Mass. Rep. 70; *Clement v. Jones*, 12 Mass. Rep. 65; *Odiorne v. Maxcy*, 13 Mass. Rep. 182;

Pratt v. Putnam, id. 361; *Fisher v. Willard*, id. 381; *Corning v. Southland*, 3 Hill, 552; *Moss v. The Rossie Lead Mining Co.* 5 Hill, 137; *Schimmelpennich v. Bayard*, 1 Peters, 264. The principle of recognition is not affected by any question arising out of the statute of frauds. "An authority, by adopting the transaction, may as well be conferred where the question of agency arises under the statute of frauds, as under the common law." *Cowan, J. Lawrence v. Taylor*, 5 Hill, 113; *Davis v. Shields*, 24 Wend. 325. But to render the assent of the principal effectual, it must be with full knowledge of the facts. *Post*, 172, n. (q.) 211.

The acts of the principal are to be construed liberally in favor of an adoption of the acts of an agent. 1 Liv. Pr. & Ag. 394; *Codwise v. Hacker*, 1 Caines' Rep. 526. See next note.

A person executing an instrument in the name of another, assuming to be his agent, but having in fact no authority for that purpose, does not exempt himself from personal liability to the person with whom he undertook to contract, by the subsequent ratification of the assumed principal. *Palmer v. Stephens*, 1 Denio, 471. *Rossiter v. Rossiter*, 8 Wend. 494.

Where A. does an act as agent for B., without any communication with C., C. cannot by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit under the act of A. *Wilson v. Turnman*, 6 Mann. & Gran. 236. In that case, (p. 242,) Tindal, C. J. delivering the judgment of the court, says: "The seizure of the plaintiff's goods"—this was an action of trespass *de bonis asportatis*—"was made by some officers of the sheriff, without any precedent authority from Turnman, who appeared upon the evidence at the trial to be a plaintiff in some suit, the nature of which did not transpire, but who is found by the jury not to have given any precedent authority to take the goods of the plaintiffs, but to have ratified the taking after it was made. The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant, of a taking under such circumstances, is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and the nature of the thing itself, that it is not.—That an act done, *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from the same act done by his *previous* authority. Such was the precise distinction taken in the Year Book, (H. 7, H. 4, fo. 24, pl. 1)—that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time. The same distinction is also laid down by Anderson, C. J. in Godbolt's Reports, 109: 'If one have cause to distrain my goods, and a stranger, of his own wrong without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying

that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for once he was a trespasser, and his intent was manifest."—In the present case the sheriff's officers who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Turnman, but the agents of a public officer or minister obeying the mandate of a court of justice. They did not assume to act at the time as agents or bailiffs of the then plaintiff Turnman, but they acted as the servants of another, viz., the sheriff, by virtue of the process directed to him by the court. And this forms the distinction between the present case, and that of *Parsons v. Lloyd*, (3 Wils. 341,) relied upon in the argument. If the defendant Turnman had directed the sheriff to take the goods of the present plaintiffs, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser. But where the sheriff acting under a valid writ by command of the court, and as the servant of the court seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action."

It is evident that there can be no stronger ratification of the act of an agent, than the principal's availing himself of the benefit of such act, although unauthorized; and that in like manner, a person by availing himself of the act of one whom he had not originally appointed his agent, must be deemed retrospectively to have created the agency from which he derives a profit. In either case, the presumed ratification subjects the principal to the same liabilities to third persons or to the agent, as if the latter had, in the one case, acted within the scope of his powers; or in the other, had been a duly constituted agent. Where bills were drawn by a supercargo, whose authority to that extent might be doubtful, for the purpose of purchasing a cargo, on the principals and others, to be paid by the principals, who receive the cargo, and dispose of it to a very considerable profit; Marshall, C. J. said; "Can they now be permitted in a court of conscience to question the authority by which the bills were drawn?" *Clark's Ex'rs v. Van Riemsdyck*, 9 Cranch, 153. Where a factor was authorized to sell goods at a limited price, and he afterwards sold them below that price; and sent an account to his principal of the sales and prices, authorized him to draw for the balance of the account, and the principal received the account and drew for the balance, and made no objections in his letters, or otherwise, to the conduct of the factor in the sales; it was held that his conduct amounted to a ratification of the factor's proceedings. *Richmond Manufacturing Co. v. Starks*, 4 Mason, 296. So, by bringing a suit against the agent to recover the proceeds of an unauthorized sale, the principal ratifies his act in making the sale. Ante, 122, n. (x); post, 173, n. (w); *The President of the Hartford Bank v. Barry*, 17 Mass. Rep. 97. See *Smith v. The Birmingham &c. Gas Light Co.* 1 Ad. & Ell. 526; *Skinner v. Dayton*, 19 Johns. Rep. 554; *Forrestier v. Bordman*, 1

small matter will be evidence of such assent.(p)

And if with a *knowledge of all the circumstances, [*172] an employer adopts the acts of his agent for a moment, he is bound by them.(q) A promise alone to pay a

Story's Rep. 43 ; ante, 4, 28, 114, 115 ; *Bell v. Cunningham*, 3 Peters, 69 ; *The Episcopal Charitable Society v. The Episcopal Church in Dedham*, 1 Pick. 372 ; *Copeland v. The Mercantile Ins. Co.* 6 Pick. 203 ; *Shiras v. Morris*, 8 Cowen, 60.

In a case in which it was sought to recover upon a bill of exchange accepted in the defendant's name by his agent, it was held that where no express authority is proved authorizing the agent to bind the principal in the manner he is sought to be charged, but such authority is presumed from the previous conduct of the party recognizing such acts as binding on him, it will be necessary to show that the instrument was taken on the faith of such previous recognition of authority in the agent to bind the principal. *St. John v. Redmond*, 9 Porter's (Alabama) Rep. 428.||

(p) *Ib.* and *Thorald v. Smith*, 11 Mod. 88 ; *Ward v. Evans*, 6 Mod. 37 ; || *Chapman v. Partridge*, 5 Esp. Rep. 256 ; ante, 169, n. (5) ;|| *Kinnitz v. Surry*, Guildhall Sittings after Mich. T. 1805, B. R. Assumpsit for not receiving corn sold. By the course of the corn market the seller's broker delivers a sample and order for the delivery of the corn to the buyer, who has till next market-day to refuse it, if he find the bulk vary from the sample. The buyer having had the corn examined, refused the contract. One objection in point of law was, that there was no memorandum of the contract signed by the buyer or his agent. Lord Ellenborough declared himself clearly of opinion, that the broker's note was not sufficient of itself, he being *prima facie* only the agent of the seller, and not of the buyer ; but if the buyer acted upon the order, as in this case he appeared to have done, by sending his servant to examine the bulk upon the authority of the broker's order that was such an adoption of the broker's agency as made him agent for both parties, and his note sufficient within the Statute of Frauds. † *Maclean v. Dunn*, 4 Bing. 722.‡ || In this case it was held, that if A. without authority, make a contract in writing for the purchase of goods by B., and B. subsequently ratifies the contract, such ratification renders A. an agent sufficiently authorized to make the contract under the Statute of Frauds.|| And therefore although in general an agent cannot depute another to sign a contract, yet the principal may render himself liable by confirming the act of the sub-agent. *Blore v. Sutton*, 3 Meriv. 246 ; *Soames v. Spencer*, 1 D. & R. 32 ; *Henderson v. Barnwall*, 1 Y. & J. 387.‡

(q) Per Buller, J. 2 T. R. 209, *in notis.*|| The assent, or acquiescence, by which the principal shall be bound, must be given with knowledge, or the means of acquiring knowledge of all the circumstances of the case.—A ratification of the unauthorized acts of an attorney in fact without a full knowledge of all the facts connected with those acts, is not binding on the principal. No

bill endorsed by an agent would not support an action, if

doctrine is better settled, on principle and authority, than this, that the ratification of the act of an agent previously unauthorized, must in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud. *Owings v. Giddings*, 9 Peters, 608, 629; *Davidson v. Stanley*, 2 Mann. & Gr. 721. If the principal, after a knowledge that his orders have been violated by his agent, receives merchandize purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury: but if the merchandize was received by the principal, under a just confidence that his order to his agent had been faithfully executed, such an inference would be in a high degree unreasonable. *Bell v. Cunningham*, 3 Peters, 69.

When the principal is informed of what has been done, he must dissent, and give notice of it within a reasonable time; and if he does not, his assent and ratification will be presumed. 2 Kent's Comm. 616; 1 Liv. Pr. & Ag. 396; ante, p. 31; *Benedict v. Smith*, 10 Paige, 127. Therefore, where the principals received a letter from their agent, in July, informing them of what he had done, and they were silent until October, and then for the first time complained; they were considered to have waived any right of action which they may have had. *Cairnes v. Bleeker*, 12 Johns. Rep. 300. The following case stated by Emerigon, *Traité des assurances*, vol. 1, p. 144, is cited, 2 Kent's Comm. 615; 1 Liv. Pr. & Ag. 49.—A merchant in Palermo, wrote to a house in Marseilles, that he had shipped goods consigned to them, to be sold on his account. The ship being out of time, the consignees at Marseilles caused the cargo to be insured on account of their friend at Palermo, and gave him advice of it. He received the letter, and made no reply, and the vessel arriving safe, he refused to account for the premium paid by the consignees, under the pretence that they had insured without orders. But the reception of the letter, and the subsequent silence, were deemed by the law merchant equivalent to a ratification of the act.—See further, *Murray v. Toland*, 3 Johns. Ch. Rep. 369, 374; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Vianna v. Barclay*, 3 Cowen, 281; *Parkhurst v. Imlay*, 15 Wend. 235; *Erick v. Johnson*, 16 Mass. Rep. 196; *Shaw v. Nudd*, 8 Pick. 9; *Benedict v. Smith*, 10 Paige, 130; *Bredin v. Dubarry*, 14 Serg. & Rawle, 30; *Richmond Manufacturing Co. v. Starks*, 4 Mason, 296.

On the other hand, the agent may forfeit his right of construing the silence of his principal as an implied acquiescence, by his own neglect in furnishing the latter with requisite information in due time. Parker, C. J. says: "The cases of ratification are, where the agent has gone beyond or besides his authority, for the benefit, as he supposes, of his principal, and gives him immediate notice. In such case, silence is construed acquies-

the endorsement were contrary to authority; yet if the authority be doubtful, such a promise is decisive.(*r*)

An executrix having authorized a person by letter of attorney to do acts relative to the administration in her name as executrix, he accepted a bill by which she was made personally liable; and though great doubt was entertained whether the executrix was bound by the acceptance, yet *her admission* that it was for a just debt and ought to be paid, was held sufficient evidence of a special authority, without reference to the letter of attorney.(*s*)

An adoption of the agency in one part || with a knowledge of all the circumstances,|| operates as an adoption of the whole act; for an act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder.(*t*) Thus an agent had been secretly employed on behalf of a bankrupt after his bankruptcy, to lay out money in India bonds. The assignees, upon discovering the fact, seized some of the bonds remaining in the agent's hands, and accepted them as part of the *estate; and afterwards [*173] brought an action against him for the money with which the other bonds were purchased. The court was very clearly of opinion that the acceptance of some of the bonds was an affirmance of the agent's act in laying out the money, and that the assignees could not avow one part of the transaction and disavow another.(*u*) This decision was referred to, and its principle adopted by Lord Hardwicke, on a bill filed for relief against a verdict obtained by the assignees of a bankrupt, who, after his bankruptcy, had paid 3000*l*.

cence and ratification. But a delay of intelligence, until an election to approve, or disapprove would be attended with no advantage to the principal, defeats the right to construe silence into ratification." *Amory v. Hamilton*, 17 Mass. Rep. 109.]]

(*r*) *Fenn v. Harrison*, 4 T. R. 177.

(*s*) *Howard v. Baillie*, 2 H. Bl. 618. + See Sec. 3, || p. 179, || note (5).+

(*t*) 2 Str. 859. || *Benedict v. Smith*, 10 Paige, 127; *Corning v. Southland*, 3 Hill, 552; *Peters v. Ballistier*, 3 Pick. 505; post, 324; *Moss v. The Rossie Lead Mining Co.* 5 Hill, 137.]]

(*u*) *Wilson v. Poulter*, 2 Str. 859; 1 Barnard. 77, 118, 136, 142, 284.

to the petitioner, and to whom the petitioner in the course of the same dealings had paid 712*l*. The bill sought to have an allowance of the latter sum, which was decreed by the Lord Chancellor, upon the principle that the assignees, to support the action of *assumpsit*, had considered the bankrupt as their factor, and that they must therefore take him as their factor in all acts done fairly and without deceit.(w)(10)

(w) *Billon v. Hyde*, 1 Atk. 128. So in *Smith v. Hodgson*, a bankrupt, on the eve of his bankruptcy, sold goods to a creditor with a view to a fraudulent preference; but the assignees having brought an action of *assumpsit* for goods sold and delivered, the form of the action was held to be an affirmance of the contract of sale, so as to entitle the creditor to set off his debt. 4 T. R. 211, and Bull. N. P. 131. ¶ As to the affirmance of an act, by adopting an action in form *ex contractu*; see *Fenimore v. The United States*, 3 Dallas, 375; *Kelly v. Munson*, 7 Mass. Rep. 323; *Peters v. Ballistier*, 3 Pick. 505. In the last cited case, the principals who had brought an action of *assumpsit* against vendees, to whom their agent had made an unauthorized sale, having discontinued that suit, recovered against the vendees in an action of trover.¶ It is said to be ruled by Parker, C. J. ¶ afterwards Lord Maclesfield, who must be carefully distinguished from the late learned Chief Justice of Massachusetts,¶ that in the case of money paid by a bankrupt after an act of bankruptcy (though for a valuable consideration) the action must be trover, for you cannot confirm the act in part and impeach it as to the rest.(11) But where a master of a ship, which was wrecked in a foreign port, sold the cargo and remitted the proceeds to the owners of the ship, and the owner of the cargo brought an action for money had and received to his use, it was contended that by this form of action the plaintiff had affirmed the master's act in selling the goods, and that consequently the owners had a right to retain for the freight *pro rata*, for the sale so affirmed had dispensed with the prosecution of the voyage. But it was held, that the plaintiff might recover without any deduction for freight, and that the only effect of this form of action was to waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money, and to confine the plaintiff's right to recover to the net proceeds of the sale. *Hunter v. Prinsep*, 10 East, 378, 394.

(10) † That an act cannot be adopted in part and rejected in part is a general rule applicable to other cases besides this of principal and agent.¶ *Capel v. Thornton*, 3 Carr. & P. 352; *Gordon v. Coolidge*, 1 Sumner,

(11) † It is, however, quite clear that the assignees may adopt the payment, treating it as money had and received by the person to whom the payment was made to the use of the assignees.]

*Thus also a broker, after the bankruptcy of his principal, gave his own acceptances, which were afterwards paid by him to the defendants, who were holders of certain valuable securities belonging to the principal, to induce them to part with those securities; and having afterwards recovered the money due thereon, deducted out of it the *amount of his own acceptances. [*174] [*175] The assignees sought to recover this sum from the defendants; but it was said by Lord Ellenborough, that the assignees having adopted the broker as their agent for the recovery of the money due upon the securities, they must adopt him throughout, and take his agency *cum onere*; and judgment was given for the defendants.(x)

SECTION 3.

Execution of Authority.

The next consideration which occurs as affecting the liability of the principal is the due execution of the delegated authority. And in pursuing this inquiry it will be necessary to examine, 1st. By whom the authority must be executed; 2d. In what manner; 3d. In what time: under the last of which heads it will be proper to touch

542; *Benedict v. Smith*, 10 Paige, 127. ¶ Thus in *Ferguson v. Carrington*, 9 B. & C. 59; Dan. & Lloyd, 198, to an action brought by the seller against the buyer for the price of goods, it was set up as a defence that credit had been given, the term of which had not expired when the action was commenced; and when the seller would have replied that the purchase was altogether a fraud and null, Lord Tenterden would not admit such an answer, on the ground, that, by bringing an action for the price, he had himself ratified and affirmed the transaction.

(x) *Hovil v. Pack*, 7 East, 164, 166. ¶ The principal may also be presumed to have adopted the unauthorized act of his agent, by not expressing his dissent thereto within a reasonable time after acquiring knowledge of the circumstances. *Benedict v. Smith*, 10 Paige, 127; ante, 31, 172, n. q. ¶

upon the means by which an authority is determined or countermanded.

1. A delegated authority can be executed only by the person to whom it is given ; for the confidence being personal, cannot be assigned to a stranger.(a) Therefore, if

(a) Roll. Ab. 330 ; 9 Co. 77 b ; 2 Roll. Ab. 9. ¶ *Potestas delegata non potest delegari*. Or, in other words, *delegatus non potest delegare*. "One who has an authority to do an act for another, must execute it himself, and cannot transfer it to another ; for this being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done." Bac. Abr. Authority, D. "An agent, ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction, or of the usage of trade, has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated ; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing." 2 Kent's Comm. 633 ; and see *Cole v. Wade*, 16 Ves. 27 ; *Schmaling v. Thomlinson*, 6 Taunt. 147 ; *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501 ; *The Inhabitants of the Town of Stoughton, &c. v. Baker*, 4 Mass. Rep. 522, 530 ; *Tippets v. Walker*, id. 595, 597 ; *Emerson v. The Providence Hat Manufacturing Co.*, 12 Mass. Rep. 237, 241 ; *Miles v. Bough*, 3 Ad. & Ell. N. S. 845 ; post, p. 177. The principal may in direct terms authorize his agent to delegate the whole, or any portion of his authority to another. 1 Liv. Prin. & Ag. 55. The power to appoint a sub-agent may be inferred from the terms of the original authority. *Gray v. Murray*, 3 Johns. Ch. Rep. 167, 178. And a consignee, or agent for the sale of merchandize, may employ a broker for the purpose, when such is the usual course of business. *Trueman v. Leder*, 11 Ad. & Ell. 589. When the principal may treat the sub-agent as his own agent, and maintain an action against him ; and how far the same may be affected by the transactions between the immediate agent and the sub-agent, see *Wilson v. Smith*, 3 How. 763.

A trustee who has only a delegated discretionary power, cannot give a general authority to another to execute such power, unless he is specially authorized to do so, by the deed or will creating the trust. So, where an estate is devised to trustees with power to sell, a general authority to an agent to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, cannot be legally given by the trustees. *Hawley v. James*, 5 Paige, 323 ; *The Trustees of the Auburn Academy v. Strong*, Hopk. 278. But they may authorize an agent to convey, after a

an agent be appointed to sell, he cannot depute the power to a clerk or *under-agent, notwithstanding [*176] any usage of trade, unless by express assent of the

ratification of the act by themselves. *Hawley v. James*, ubi supra. The signing, sealing and acknowledgment of the deed is a mere mechanical act. *Infra*.

The general principle applies equally to persons deriving their authority under a legislative enactment. Thus, it was held, that the authority conferred upon the canal commissioners, to enter upon and take possession of the lands, &c., of individuals for the construction of a canal, can be executed by them only in person, or under their express direction; and that an engineer, or any other sub-agent of the state, cannot lawfully exercise such power but by the express direction of the canal commissioners, or one of them, although to such engineer, or other sub-agent, has been entrusted the superintendence of the construction of the canal in the vicinity of the premises entered upon. *Lyon v. Jerome*, (in error,) 26 Wend. 485. The following extract from the opinion of Verplanck, Senator, in the last cited case, which appears to have been the leading opinion, affords a luminous view of the subject. He says; "In all cases of delegated authority, where the delegation indicates any personal trust or confidence reposed in the agent, and especially where such personal trust is implied by making the exercise and application of the power subject to the *judgment* or *discretion* of the agent or attorney, the general rule is, that these are purely personal authorities, incapable of being again delegated to another, unless a special power of substitution be added. From an early period of our law, this rule has been laid down as to powers given by will or deed to executors, trustees and attorneys, to sell land, make leases, &c.; and modern decisions have extended the principle to the less formal appointments of factors, brokers and other commercial agents. How much more strongly then, must the reason and policy of the rule apply to the delegation of authority by the state, to its high public officers, made with the solemnity of a legislative act? The language of the statute, as well as the nature of the trust itself, shows that this is an authority confided to the *judgment* and *discretion* of the commissioners themselves, for the impartial discharge of which they are responsible to the state.—In this instance, as in similar cases of authority to represent private individuals, the person thus interested may have occasion to depend upon scientific or professional advice for the guidance of his own judgment. He may even in matters out of the scope of his own information, rely entirely upon the authority of his adviser or assistant. Yet he is still bound to form a judgment for himself, and to assume its responsibility. In this case there was no exercise of any judgment or discretion whatever by the commissioners; there was merely such a general reliance on the supervision and judgment of the engineer, as might amount to an implied delegation of authority, had the commissioner been

principal.(b)(1) In the case of *Coles v. Trecothick*, the

authorized by law to make such a substitution. But as the circuit judge before whom the cause was tried, well stated it, 'it is the judgment of the commissioners, or one of them, which is to determine the propriety of the entry, and not that of the agents, &c.' Such is the obvious construction of the statute. A contrary construction would be unreasonable and extravagant, &c. &c."

Where an officer has power to make a deputy, such deputy may do any act that his principal might do; and less power he cannot have, except that he cannot appoint a deputy, for that implies an assignment of his whole power, which he cannot assign over. He may however depute a person to do a particular act, and such person shall be considered to do it as his servant. This is the common case of under-sheriffs, who have the power to make bailiffs to execute process, by virtue of their deputations. Therefore, where the deputy steward of a manor authorized another person to take the surrender of a copyhold estate, such surrender was held good. 1 Liv. Pr. & Ag. 31, citing *Parker v. Kett*, 1 Lord Raym. 658; Salk. 95; 12 Mod. 466.

Where it is within the range of the authority of a factor to employ a sub-agent, for instance, an auctioneer to sell goods consigned to him, it is his duty to overlook the proceedings of such sub-agent, so as to protect his principal from loss. *Amory v. Hamilton*, 17 Mass. Rep. 108.

A mere mechanical act may be performed by the delegate of an agent, by the direction of the agent. As where the agents having authority to accept bills for their principals directed their book-keeper to accept certain bills drawn on the principals, which the book-keeper did in his own name, in the following form; "E. N. & Co. per A. G. C.:" this was held a valid acceptance. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; post, 199, n. 9. In a case there cited, (p. 506; *Mason v. Joseph*, 1 Smith's Rep. 406,) Lord Ellenborough put the case of a person who had the gout in his hands, and could not sign himself. So, a letter acknowledging a debt contained this passage: "A severe attack of gout in the hand, obliges me to employ an amanuensis;" and the letter concluded: "I am, sir, your most obedient servant, for T. T.—L. T." It being proved that the letter was written by Miss L. T., the daughter of T. T., according to his dictation, and was signed by her in his presence, it was held a sufficient acknowledgment within the statute, 3d & 4th Will. 4, c. 27, requiring an acknowledgment in writing to prevent certain claims from being barred by lapse of time. *Lord St. John v. Boughton*, 9 Sim. 219.||

(b) *Coles v. Trecothick*, 9 Ves. Jun. 236, 251, 252.

(1) [In the case of *Blore v. Sutton and others*, 3 Merivale, 237, it was decided by the late Master of the Rolls, that an agreement for a lease, evidenced only by a memorandum in writing, entered in the book of A.'s authorized agent, signed not by the agent himself, but by his clerk, was not

defendant had retained a person named Smith, an auctioneer, to sell his estate. During the absence of Smith the estate was sold by one of his clerks; but it appeared in evidence that previous to Smith's departure, in consequence of the seller's inquiry whether any delay would be incurred by his absence, the latter was told by him that he was in the habit of allowing his clerks to sign contracts, witness instruments, and conduct his business. Upon a bill for performance of the contract, Lord Eldon reprobated the doctrine that if an auctioneer is authorized to sell, all his clerks are, during his absence in consequence of any usage in that business, agents for the party who authorized him. But his lordship thought the evidence of the seller's assent to the sale by the clerk was sufficiently express to bind him.(c)

*‡ And so, as has been seen, a factor cannot dele- [*177] gate his employment to another, so as to raise a privity between that other and his principal, or consequently to confer upon the person deputed as against the principal any right, whether of commission, repayment, or lien.(2) Neither can one, specially entrusted to sell, relieve himself from accounting to his principal by devolving the trust upon

a sufficient agreement in writing, it not being signed by an agent properly authorized, notwithstanding the entry was shown in evidence to have been approved by, and to have been made under the immediate direction of the authorized agent, and in the usual course of business in his office.] ‡ And see *Henderson v. Barnwall*, 1 Y. & J. 387.‡

(c) *Coles v. Trecothick*, 9 Ves. Jun. 236, 251, 252; ‡ and see *Blore v. Sutton*, supra, || n. 1;|| and *Mason v. Joseph*, 1 Smith, 406.‡ || Ante, 160, n. 7.||

(2) ‡ *Solly v. Rathbone*, 2 M. & S. 299; ante, p. 150; *Cockran v. Irlam*, ib. 301; *Schmaling v. Tomlinson*, 6 Taunt. 147.‡ || "When a person employed as an agent to transact any business for another, employs a sub-agent to do the whole, or any part of the business, without the knowledge and consent of the principal, there is no privity in such case between the sub-agent so employed and the principal, which will entitle the former to claim from the latter compensation for his work and labor, or repayment of his expenses." 1 Liv. Pr. & Ag. 64; *Cull v. Backhouse*, cited 6 Taunt. 148. But see *Lincoln v. Battelle*, 6 Wend. 475, 481; *Smith v. Boutcher*, 1 Carr & Kirwan, 573.||

another, though he have acted *bona fide* for the interest of the principal.(3)†

An authority given to two cannot be executed by one,(d) though one die or refuse.(e) If an authority be to A. B. and C. to sell after the death of D., and one die before D., the others cannot sell.(f) An authority to three *jointly* and *separately* is not well executed by *two*.(g)

(3) † *Catlin v. Bell*, 4 Campb. 184; cited ante, p. 3, (a.)†

(d) Co. Lit. 112 b, 181 b. || *Green v. Miller*, 6 Johns. Rep. 39 *Franklin v. Osgood*, 14 Johns. Rep. 553; *Sinclair v. Jackson*, 8 Cow. 544; *Towne v. Jaquith*, 6 Mass. Rep. 46; *The Inhabitants of the First Parish in Sutton v. Cole*, 3 Pick. 244; *Copeland v. The Mercantile Ins. Co.* 6 Pick. 198; *Baltimore Turnpike*, 5 Binney, 484; *Osgood v. Franklin*, 2 Johns. Ch. Rep. 19; *Peter v. Beverley*, 10 Peters, 564; *Floyd v. Johnson*, 2 Littel's (Kent.) Rep. 115; Story on Bailm. § 202.||

(e) Co. Lit. 112 b, 181 b, and 1 Com. Dig. 144; 1 And. 145. || Mr. Russell, (Fact. & Brok. 318,) suggests, that "perhaps this rule would be relaxed for the convenience of commerce, so as, in the case of the death of one of two or more joint factors or brokers to admit of a valid execution of the authority by the survivor or survivors."||

(f) Co. Lit. 112 b.

(g) Co. Lit. 181 b; 1 Roll. Ab. 329. But if there be a warrant to five bailiffs upon a *fi. fa. conjunctim et divisim*, execution by two or three will be well. 1 Roll. Ab. 329, l. 5; Com. Dig. tit. Attorney, c. 8. † The rule is, that a naked authority must be construed and pursued strictly. The words *jointly and severally* and *jointly or severally* have therefore been construed as authorizing all to act jointly, or each one to act separately, but as not authorizing any portion of the number to do the act jointly. That this is a very technical and narrow construction is manifest, and one cannot but rejoice to see that the Court of King's Bench would not apply it to a case where it would have wrought manifest injustice, and defeated the intention of the party who gave the power. The case was this: A power of attorney was given to fifteen persons therein named *jointly or severally* to execute such policies as they, or any of them, should *jointly or severally* think proper. Four of the persons named executed the power by underwriting a policy; and the Court held the principal bound, upon the plain meaning of the power itself. *Guthrie v. Armstrong*, 5 B. & Ald. 628.† || The rule that a power or authority given to two or more, cannot in case of the death of either be executed by the survivor, does not apply to a power coupled with an interest in the grantees of the power; and an equitable interest is sufficient. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1; S. C. on appeal, 14 Johns. Rep. 527. As, where a testator devises his real and personal estate to several persons as tenants in common, some of whom

*2. As to the *manner* in which an authority is [*178] to be executed.

he appoints his executors, and empowers them, or the major part of them to sell his real property, this is a power coupled with an interest; that is the interest which the executors have as devisees, and may be executed by the survivors or the major part of them. *Jackson v. Burtis*, 14 Johns. Rep. 391; *Osgood v. Franklin*, ubi supra; *Jackson v. Given*, 16 Johns. Rep. 167; *Bergen v. Bennett*, 1 Caines' Cas. 15; *Bull v. Bull*, 3 Day, 385. And where the power is *per se*, merely a naked power, and yet in other parts of the will, or instrument creating the power, there are trusts and duties imposed upon the executors, or grantees of the power, which require a sale to be made in order to effectuate the interest of the testator or grantor, in such case the power survives. *Osgood v. Franklin*, ubi supra. So, Mr. Justice Thompson in delivering the opinion of the court in *Peter v. Beverley*, 10 Peters, 532, 564, says: "It may, perhaps be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction in a will, to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who is directed to be done, in which third persons are interested, and who has a right to enforce an execution of the power. But where anything have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise; for a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian or other trustee, is invested with the rents and profits of lands, for sale, or the use of another; it is still an authority coupled with an interest, and survives." And see *The President &c. of the Bank of the United States v. Beverly*, 1 Howard, 147, 148; *Zebach v. Smith*, 3 Binney, 69; *Clark v. Campbell*, 2 Rawle, 215; *Kling v. Hammer*, 2 Penna. Rep. 349.

The authority of arbitrators is a mere naked power. So, where there was a parol submission to five arbitrators, it was held that all must concur in the award: and even where the submission provides that a less number than all the arbitrators named may make the award, all must be present unless those who do not attend, had proper and sufficient notice, and are wilfully absent. *Green v. Miller*, 6 Johns. Rep. 39; *Crofoot v. Allen*, 2 Wend. 494; *Yates v. Russell*, 17 Johns. Rep. 461; *McKoy v. Curtice*, 9 Wend. 19.

Where there are several joint agents, the principal is liable for the fraudulent act of one of them. Williams, being a director of a bank, received from Davis certain bills drawn by Davis, which he was to get discounted

Acts done by an agent within the scope of his authority,

for the benefit of Davis, instead of which, he got the bills discounted for his own benefit, in the board of directors of which he was a member, without informing the other members of the board how he came by the bills, but told them that the discount was for his own benefit. He appropriated the proceeds of the discount to his own use. In an action by the bank against Davis, on the bills, a verdict for the bank was set aside and a new trial granted, on the ground of the fraudulent conduct of Williams. The bank was the principal, and he, as a director, was one of the joint agents of the bank, which could not assert a right infected by the fraud of one of its own agents. Nelson, C. J. "It is said that Williams was but one of the five empowered by the bank to represent it in this transaction; that the bank therefore is not to be held responsible for his individual fraud at the time, nor can it be chargeable with the knowledge of the facts under which the paper in question was discounted; and that such knowledge is chargeable only when the agent has full power to act for the principal in the particular case. It is not to be denied, that if a principal employs several agents to transact jointly a particular piece of business, he is equally responsible for the conduct of each and all of them while acting within the limit and scope of their power, as completely so as he would be for the conduct of a single agent upon whom the whole authority had been conferred. He cannot shift or avoid this responsibility by the multiplication of his agents. It is also clear, that the corresponding responsibility of each of the several joint agents to the principal for the faithful discharge of their duties, is as complete and perfect as in the case of a single agency; and any prejudice to the principal arising from fraud, misconduct, or negligence of either of them, would afford ground for redress from the party guilty of the wrong. These are general conceded principles for which no authority need be cited. One of the grounds for charging the principal with the knowledge possessed by the agent is, because the latter is bound to communicate the fact to the former, and is liable for any prejudice that may arise from a neglect in this respect; and hence the law presumes that the principal has had actual notice. Now, the duty of any one of the joint agents is as obligatory upon him in this respect, as if he had possessed the sole power in the matter of the agency, and any prejudice resulting from the neglect would afford a like redress.—Upon these views, it seems to me consistently and reasonably to follow, that in case of a joint agency by several persons—as of the directors of a bank—notice to any one, or the acts of any one, while engaged in the business of the principal, is notice to the bank itself. The corporation is acting and speaking through the several directors who jointly represent it in the particular transaction. In judgment of law it is present, conducting the business of the institution itself; the acts of the several directors are the acts of the bank; their knowledge, the knowledge of the bank, and notice to them notice to the bank.—The hardship of holding the plaintiffs responsible for the fraudulent conduct of a single director, has been alluded

and in which his commission is punctually pursued, are of

to ; but between two innocent parties in this case, where should the responsibility fall ? The plaintiffs appointed the director, and thus held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud. It has been said that he was the agent of Davis in procuring the discount of the paper, and not of the bank. The answer is, that the bills were placed in his hands as a director, and because he was one. They were placed there for the purpose of being brought before the board, that they might be passed upon in the usual and customary way of procuring accommodations. Thus far he may be regarded as the agent of Davis ; but beyond this, the action upon the bills was the action of the board, and the discount the discount of the board, which was composed of the admitted agents of the plaintiffs." *The Bank of the United States v. Davis*, 2 Hill, 451, 463, et seq. This case has been stated more fully, inasmuch as doubts in regard to the soundness of the decision are insinuated by Mr. Justice Story, (Agency, § 139 *a*, and note 2, *ibid.*) who says ; " The question has been made in cases of joint agency, (not of joint and several agency,) how far the acts or omissions or representations, or concealments or negligences of one agent in the common concern entrusted to them, unknown to the others, will affect their principal. It would seem clear upon principle, that where the authority given is joint, neither of the agents can act, so as to bind the principal by his act without the co-operation of all the others in the same act. If then, the act of one joint agent alone will not bind the principal, upon what ground can his admissions, or representations, or concealments, or negligence have a more conclusive or comprehensive effect ? Yet it seems sometimes to have been thought, that in cases of mere joint agency, the act of one of the several joint agents would bind the principal ; and certainly, if that be correct, the conclusion seems irresistible, that the admissions, representations, concealments, and negligences of one of several joint agents ought equally to bind the principal." The author refers solely, to the above cited case of *The Bank of the United States v. Davis*, " where [see *ibid.* note 2,] the doctrine is maintained, that in cases of joint agency, the principal is responsible for the conduct of each and all of his agents, while acting within the limits of the power conferred on them, that is, on all of them jointly. It deserves consideration, whether this doctrine is maintainable except in cases where the power is joint and several." Whether a director of a bank is to be regarded as an agent of the bank may be a question ; (see post, 263 *n. f.*) but assuming that he is so, wherein does the judgment of the Chief Justice of New York contravene established principles ? the question was not whether one joint agent could grant or convey an estate, right, title or interest ; but where an agent having an apparent authority, abuses it, who shall be the sufferer ? the party from whom the authority was derived, or he who suffers from the fraudulent act of an authorized agent ? " For seeing some-

course binding upon the principal ; but where the authority

body must be a loser by this deceit, it is more reason that he that employs and confides in the deceiver should be a loser, than a stranger." Post, 302, 303, 325.

The rule requiring the concurrence of all the joint agents, does not apply to the case where a number of persons are entrusted with powers of a public nature, and not of mere private confidence : and when all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. Bac. Abr. Authority C. Bouvier's ed. vol. 1, p. 525, and cases there cited. 7 Cowen, 530, n. (a) and cases there cited. So, in *Downing v. Rugar*, 21 Wend. 278, it was held, that in the exercise of a public as well as private authority whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number be such as to admit of a majority, such majority will bind the minority after all have duly met and conferred. And where the authority is conferred upon two, nothing can be done without the consent of both ; yet where the authority is public, to prevent a failure of justice, or injury to the public, one may act without the other ; as, if one be dead, or interested, or absent. Upon this principle one of two overseers of the poor is authorized to institute and carry on proceedings for the seizure of the property of one who has absconded, leaving his wife or child chargeable to the town. At all events, where only one overseer acts, the consent of the other will be presumed, upon the presumption in favor of the performance of official duty, that he had been conferred with and consulted as to the proceedings to be had. So, in another case, Cowen, J. says : " It has long been perfectly well settled that where a statute constitutes a board of commissioners, or other officers to decide any matter, but makes no provision that a majority shall constitute a *quorum*, all must be present to hear and consult, though a majority may then decide." *Crocker v. Crane*, 21 Wend. 211, 218 ; and see *Withwell v. Gartham*, 6 Term Rep. 388 ; *Grindley v. Barker*, 1 Bos. & Pul. 229 ; *Orois v. Thompson*, 1 Johns. Rep. 500 ; *Green v. Miller*, 6 Johns. Rep. 39 ; *Ex parte Rogers*, 7 Cowen, 526 ; *McCoy v. Curtice*, 9 Wend. 17 ; *Woolsey v. Tompkins*, 23 Wend. 324 ; *Baltimore Turnpike*, 5 Binney, 481 ; *McCready v. Guardians*, 9 Serg. & Rawle, 94 ; *Damon v. The Inhabitants of Granby*, 2 Pick. 345.

It would seem also that in some cases connected with mercantile transactions, the strict rule requiring all the agents to combine in the performance of an act, will be relaxed. As where there is a joint consignment of goods to two factors for sale, each of them will it is said, be considered to possess the whole power over such goods for the purposes of the consignment, whether they are partners or not—the mere fact of the joint consignment being taken to import a consent on the part of the consignor, that the consignees should trust one another in the business. *Godfrey v. Saux-*

is particular, the party must pursue it;(A) and if the act vary from it, he departs from his authority, and what he does is void;(h) unless the variance be merely circumstan-

ders, 3 Wils. 73. So, where directions had been given to G. W. & Co. of London, to effect a policy of insurance, and it was effected by the house of G. & Co. of Liverpool, which consisted of the same component members as the London house, Lord Ellenborough held, that if the two houses had had one member only in common, the policy would have been properly effected. *Dickson v. Lodge*, 1 Starkie, 226.||

(A) || “Every contract made with an agent in relation to the business of the agency, is a contract with the principal entered into through the instrumentality of the agent, provided the agent acts in the name of his principal. The party so dealing with the agent is bound to his principal; and the principal and not the agent is bound to the party. It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible and not the agent.” 2 Kent’s Comm. 629, 630.||

(h) Salk. 96. || Post, 201, et seq. A. gave to B. a power of attorney to grant, bargain, sell, release, &c. in fee, certain lands, and on such sale to “execute, seal, and deliver in the name of A. such conveyances and assurances in the law of the premises to the purchaser, in fee, as should be needful or necessary, according to the judgment of B. his attorney.” B. executed a deed with the usual covenants of seisin, &c. “*Per Curiam*. The attorney was authorized to sell and to execute conveyances, and assurances in the law, of the lands sold; but no authority was given to bind his principal by covenants. A conveyance or assurance is good and perfect without either warranty or personal covenants; and therefore they are not necessarily implied in an authority to convey; an authority is to be strictly pursued, and an act varying in substance from it is void.” *Nixon v. Hyserott*, 5 Johns. Rep. 58; *Wilson v. Troup*, 2 Cowen, 196. But see *Vanada v. Hopkins*, 1 J. J. Marshall’s (Kentucky) Rep. 293. So, an agent authorized to bargain and sell lands, has no right under such power to grant a license to the purchaser, previous to a conveyance, to enter and cut timber, although such license be given with a *bona fide* intent to effect the sale of the lands. *Hubbard v. Elmer*, 7 Wend. 446. Mr. Livermore has stated some valuable principles, deduced from the civil law, applicable to the immediate topic, and which we cannot hesitate to adopt as a portion of our own law. The following extracts are introduced in this place: some others may be found in a subsequent note.

“When the agent has made the covenant, which he was employed to make, upon terms more advantageous than those prescribed to him, it is evident that he has acted within the limits of his authority; but if the terms are less favorable, it will be otherwise, and the principal will not be

bound. If I have authorized you to buy for me the estate of J. S., at 50 dollars per acre, and you contract for it at 51 dollars per acre, I shall be under no obligation to ratify the bargain. If, in this case, you offer to pay the surplus of one dollar per acre, shall I be bound by your contract? The Roman lawyers were divided upon this question. The opinion [of those who held the affirmative,] which prevailed in the civil law, is evidently the most reasonable, and would be adopted with us; for my agent has substantially made the contract within his authority, when he has obtained for me the estate at the expense of 50 dollars per acre, and it is the same thing whether he originally gave a dollar an acre more out of his own property, as an inducement to J. S. to sell the estate, or whether having made the bargain at 51 dollars, he indemnifies me for the difference. So also if I have directed my agent to cause an insurance to be effected for me, and he pays a higher premium than that prescribed by the order; the commission will be well executed, the excess being a charge upon him." 1 Liv. Pr. & Ag. 97; 2 Kent's Comm. 618.

"If an agent has executed his commission but for a part, he obliges his principal so far. As if the commission were to purchase fifty shares of the stock of a bank, and the agent contracts with a person, who is the owner of but thirty, for the purchase of that number, intending to obtain the other twenty from some other man; the principal will be bound by that contract, although the agent afterwards fail in his attempt to buy the remaining twenty. So, if a merchant direct his correspondent to insure two thousand dollars upon a particular ship, and after one underwriter has subscribed one thousand dollars, the others refuse to take the risk; in this case the commission is well executed for a part, and the principal will be obliged to pay the premium.—But if the business be of an entire nature, so that it must appear to have been the intention of the principal that it should be done *in toto*, the agent, who has executed it only for a part, will be considered to have done nothing, and the principal will contract no obligation. Therefore if I have commissioned you to buy for me a certain plantation, and you have bought a part of it only; this purchase which you have made in my name, will not be obligatory upon me; for this business is of an entire nature, and although I might have a desire to be the owner of the entire plantation, yet its value may be very much lessened, or in my estimation lost, by a division of it. If, however, when I employed you to purchase this plantation, I knew that it was owned by several tenants in common, who proposed to sell their interests separately, I shall be bound by your contracts, if you have purchased the estates of some of the tenants in common, but have not been able to purchase of the others; unless there were an express provision, that I should be obliged only in case of all the estates being purchased. It is the same thing if the estate which the agent has obtained is less than that which he was authorized to purchase. As if I have given you an authority to purchase for me the estate of J. S. in a certain dwelling house of which he has the fee simple, and you procure me a lease, for life, or a term of years; this will not be in pursuance of your authority." 1 Liv. Pr. & Ag. 99, 100. It might be otherwise if the agent

tial.(i) Thus an authority given by an executor to pay, discharge, and satisfy all debts due from the testator, and to do all acts for the principal as executor, does not empower the agent to charge the executor(4) by acceptances generally in his name, though for a debt due from the testator.(k) It should, however, be observed, that the decision upon this point is opposed by that of Lord Loughborough, given in a similar *case, where, however, [*179] the judgment proceeded upon other grounds.(l)(5)

If it be to do an act upon condition, and the agent do it absolutely, it is void, and *vice versa*.(m)

was directed to buy a farm of 150 acres, and he buys one corresponding to the directions as nearly as possible, containing 140 acres only. 2 Kent's Comm. 619. So, if a power be given to buy a house, with an adjoining wharf and store, and the agent buys the house only, the principal would not be bound to take the house, for the inducement to the purchase has failed. *Ibid.*||

(i) 1b. and Co. Lit. 49 b, 303 b.

(4) † More correctly thus: "to charge the acceptor *personally* by accepting a bill *per procurationem*, though, &c."†

(k) *Gardiner v. Baillie*, 6 T. R. 591. || Post, 192, n. 3.||

(l) *Howard v. Baillie*, 2 H. Bl. 623.

(5) † The case of *Howard v. Baillie* can hardly be supported in any view which can be taken of it. An *implied* authority cannot in general have place where there is an *express* authority in writing. || Post, p. 192.|| The nature and extent of the authority must in that case be gathered from the written instrument alone. To be sure, if the principal directly adopt the act, it may then be considered as his act, and there will be no need to have recourse to the terms of the appointment. But in the case cited, the admission merely went to this: that the debt, in respect of which the acceptance was given, was a just debt, and ought to be paid; there was no recognition of an authority in the attorney either specially to accept bills, or generally to make the executrix personally liable. That the terms of the power did not warrant such an act will be seen on reading it as it is set out at length in the report of H. Bl. 624. See several cases of a like nature, post, sec. 5, "on the *Extent of the Authority*," to which head this case is, perhaps, more properly referrible.†

(m) Co. Lit, 258 b. || If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney deliver seisin absolutely, the livery is not good, because the attorney had no authority to create an absolute fee simple; and, therefore, such absolute feoffment shall not bind the feoffor, because he gave no such authority. But if the letter

Regularly, says Lord Coke, if a man do less than the command or authority committed to him, there (the commandment or authority not being pursued) the act is void; but where a man doth that which he is authorized, and more, it is good for that which is warranted, and void for the rest.⁽ⁿ⁾ But both these rules may have many exceptions and limitations.

of attorney had been to make livery absolutely, and the attorney had made it upon condition, this seems a good execution of his power, and the feoffment good, because when the attorney has once delivered seisin, he has fully executed his power; and the condition annexed to it, being without authority, is void; and, therefore, shall not destroy the operation of the livery. *Ibid.* *Bac. Abr. Authority, G.* (Bouvier's ed. vol. 1, p. 523.)

(n) *Ib.* ¶ "When the agent has done the act which he was authorized to do, and something more; this will be a good execution of his authority, as to what he has done within the limits of his power, and void as to the residue. As if a merchant directs his correspondent to effect an insurance upon a certain ship, and the correspondent insures two thousand dollars upon the ship, and two thousand dollars on the cargo; in this case, the insurance on the ship will have been made in pursuance of the agent's authority, and the insurance upon the cargo will have been made without authority. So, if a warrant of attorney be given to make livery to one, and the attorney make livery to two; or if the attorney had authority to make livery of Black-acre, and he make livery of Black-acre and White-acre, though the attorney has in these cases done more, yet there is no reason that should vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity and void. [*Bac. Abr. Authority, G.* Bouvier's ed. vol. 1, p. 523.] It is the same, if an estate be raised [created] more durable in point of time than the power is limited to extend to. As where the power is to lease for ten years only, and the lease is made for twenty; this is good in equity [but not at law, *Roe v. Pridesour*, 10 East's Rep. 158,] for ten years and not for the residue." 1 *Liv. Pr. & Ag.* 101, 102. "It is evident that the agent has exceeded his authority, when the thing which he has done is different from that which he was authorized to do, although it may be more for his principal's advantage. As if I have given you authority to buy for me the house of Peter, at a certain price, and you have bought a better house, at the same price, or for less money; I shall not be bound by this contract." *Id.* 103; 2 *Kent's Comm.* 620.¶ But where a man has an authority coupled with an interest, he may do less than his authority commands. 1 *Com. Dig.* 645. ¶ So, a power to sell implies a power to mortgage, which is a conditional sale. *Mills v. Banks*, 3 P. Wms. 1, 9; *Ball v. Harris*, 4 Myl. & Cr. 267; *Haldenby v. Spafforth*, 1 Beav. 394. So, a power authorizing the attorney to bargain, sell, convey

· *Whatever would be sufficient if done by the [*180] principal, is sufficient to be done by his representative, though the inability which excuses the principal from doing more, does not affect the agent.(o)

3. With regard to the *form* to be observed in the execution of an authority, ||in order to bind the principal,|| it is an established rule, ||though subject to exceptions|| that an act done under ||an authority, and more especially under a written|| power of attorney must be done in the name of the person who gives the power, and not in the attorney's name. It was resolved in *Combe's case*,(p) that when one has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person, and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority ; and this maxim is recognized *in many subsequent instances.(q) And in a prior [*181]

and assure a tract of land, confers authority to execute a lease for life, containing a provision for the eventual sale. *Williams v. Woodard*, 2 Wend. 487.]] † Where there is a complete execution of a power, and something, *ex abundanti*, added which is improper, there the execution shall be good, and only the excess void ; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad. See *Alexander v. Alexander*, 2 Ves. 644 ; *Ib.* note (202.) To pursue this subject further would lead us into the difficult and abstruse learning of "Powers," for which the reader is referred to Sir E. Sugden's elaborate Treatise. It can have little place in mercantile questions, where the act done is for the most part indivisible.‡

(o) Co. Lit. 258 a.

(p) *D'Abridgcourt v. Ashley*, 9 Co. 76, 77 ; Moor, pl. 1106. Sir F. Walsingham, under a power of attorney from Sir P. Sidney, made a lease in his own name, and held bad.

(q) 1 Str. 705 ; 2 East, 142. || 2 Kent's Comm. 631 ; *Lessee of Clarke v. Courtney*, 5 Peters, 318 ; *Lutz v. Linthicum*, 8 Peters, 165 ; *Many v. The Beekman Iron Co.* 9 Paige, 188 ; *Bogart v. DeBussey*, 6 Johns. Rep. 94 ; *Taft v. Brewster*, 9 Johns. Rep. 54 ; *Skinner v. Dayton*, 19 Johns. Rep. 568 ; *Stone v. Wood*, 7 Cowen, 453 ; *Spencer v. Field*, 10 Wend. 88 ; *Pentz v. Stanton*, id. 271 ; *Townsend v. Corning*, 23 Wend. 435 ; *North River Bank v. Aymer*, 3 Hill, 263 ; *Tippets v. Walker*, 4 Mass. Rep. 595,

case it was decided, that where one had a power of attorney to release a debt, the release being in his own name, was void.^(r) So the execution and delivery of a deed must be in the name of the principal, and if it be the execution of the agent only, it is void as to the principal; as where the King granted authority to one to make leases, a lease made by him in the King's name, but *executed* by himself, was held void, for the execution ought to have been with the King's seal, thus: "The King by A. B. puts his seal, &c."^(s)

597; *Fowler v. Shearer*, 6 Mass. Rep. 14; *Stackpole v. Arnold*, 11 Mass. Rep. 26; *Arfridson v. Ladd*, 12 Mass. Rep. 175; *Elwell v. Shaw*, 16 Mass. Rep. 42; *Copeland v. The Mercantile Ins. Co.* 6 Pick. 203; *Bradlee v. The Boston Glass Manufactory*, 16 Pick. 347; *Hopkins v. McNaffey*, 11 Serg. & Rawle, 129. "No person in making a contract is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal, on whose behalf he gave his signature. It is also held, that whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person." Parker, J. *Stackpole v. Arnold*, ubi supra. So, authority by a husband to his wife to *give notes*, will not subject the husband to the payment of a note given by the wife, *in her own name*, without reference in the body of the note, or in the signature, to the husband. Sutherland, J. "It was signed with the name of the wife, without any reference whatever, either in the body or signature to the defendant, [the husband], and without purporting to be signed by her, as the agent of, or on behalf of her husband. Nothing but proof of a special authority from the husband to the wife to sign in that manner would make the instrument the note of her husband. Her authority as agent merely, was to give a note in the name of her husband. If an agent signs his own name, instead of the name of his principal, as a general rule, the principal will not be bound." *Minard v. Mead*, 7 Wend. 68. See *Hefferman v. Addams*, 7 Watts, (Penn.) Rep. 116; *Hunt v. Rousmaniere's Ad'mrs*, 2 Mason, 248; S. C. 8 Wheat. 174.]]

(r) *D'Abridgcourt v. Ashley*, Moor, 818. || *Wells v. Evans*, 20 Wend. 251; S. C. in error, 22 Wend. 324.]]

(s) *Anon.* Moor, 70, pl. 191. || So, a power of attorney given by C. and his wife to an agent to sell and convey lands is not well executed by a deed

In the application of this rule, however, a difference is to be observed between a bare act, such as the surrender of

in the following form, "I the said C. L. C. attorney as aforesaid, &c. do &c." and concluding, "In witness whereof the said C. L. C., attorney as aforesaid, has hereunto subscribed his hand and seal this day &c. in the year &c. C. L. C. [L. S.]" The objection is, Story J. says, "that the deed is not executed by C. and his wife, but by the attorney in his own name. It is not then the deed of the principals but the deed of the attorney.—The act does not therefore purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity." *Lessee of Clarke v. Courtney*, 5 Peters, 318, 349.

An agreement under seal, for the sale and conveyance of land, commenced as follows; "Article of agreement made &c. between Isaiah Townsend, John Townsend, &c. &c., by Harvey Baldwin of &c. their attorney of the first part, and Richard S. Corning of the second part, witnesseth, the said parties of the first part, for and in consideration &c. do covenant and agree, &c." It closed in these words: "In witness whereof the said Harvey Baldwin, as attorney of the parties of the first part, and the said party of the second part, have hereunto set their hands and seals the day and year first above written. Harvey Baldwin, [L. S.] Richard S. Corning, [L. S.]" On the back of the contract John Townsend made the following endorsement: "I hereby countersign and approve the within contract. In witness, &c. signed John Townsend, [L. S.]" In an action on the agreement by Townsend and the other persons named therein as parties of the first part, against Corning the party of the second part, it was held that they could not recover. It may be inferred, though it is not stated in the report, as it should have been, that the question arose on a demurrer to the declaration. Bronson J. delivering the opinion of the court says: "This is not the deed of the plaintiffs and Isaiah Townsend; for although they are named in it with the apparent intention of becoming parties, they have not executed the instrument either in person, or by attorney. Their names and seals at the end are not only wanting, but as if to put the matter beyond doubt, the *in testimonium* clause states, that Baldwin of the one part, and Corning of the other, have set *their* hands and seals. It is true that Baldwin is described in the contract as *attorney*, but it was nevertheless *his* hand and seal, and not the hands and seals of the principals, which was affixed to the deed. Although the principal will sometimes be bound where the agent, as such, does an act *in pais*, though in his own name, or makes a commercial or other contract though not under seal, without subscribing the name of the principal; yet the doctrine is well settled, in relation to *solemn instruments under seal*, that the principal will only be bound where

a copyhold, the execution of a deed, &c. and the form of a contract. It is equally necessary in both that the thing

he is, both in form and substance, the contracting party. It must be *his* deed. If it be the deed of the agent only, it will neither pass the title of the principal, nor bind him as a covenantor." After referring to various authorities on this subject, the learned judge proceeds: "In several of the cases to which I have referred, the attorney, after describing himself as such, or setting out his authority, has *himself* granted or agreed, instead of framing the instrument as has been properly done in this case, so as to make the *principal* grant or agree. But it is not enough that the body of the instrument was drawn in the proper form. It required to be signed and sealed before it became the deed of any one; and the signature and seal of one man, could not make it the deed of another. It is said that this is a technical rule, and should yield to the plain intent of the parties. It is very far from being clear in this case that Baldwin intended to bind his principals. After naming the plaintiffs as contracting parties in the body of the instrument, the attorney was careful in the conclusion, not only to execute, but to say that he executed for himself only.—But waiving this consideration and assuming that Baldwin meant to bind his principals, his intention can only govern when it has been manifested in the forms prescribed by law. It is not enough that a man intends to do a legal act, unless he uses the legal means for accomplishing his object. A man may intend to alien his lands without writing, or to pass a fee simple interest without deed, but his intention will fail for want of legal execution. The law is full of just such technical rules as that which we have been considering—rules which require parties to act in a particular manner, and defeat their purpose when they neglect the forms and solemnities prescribed by law. The defendant is not bound by the alleged contract. Although he signed and sealed, the execution of the instrument was not completed, and it is not his deed. What are the facts when taken in connection with the legal principles already considered? A writing *inter partes* is prepared, by which one party is to covenant for the payment of money, and the other for the conveyance of lands—each of these mutual covenants being the consideration for the other. One party sits down and executes the deed; but the other stops short, and for some cause—no matter what—does not execute the instrument. It is impossible, I think, to maintain, that the party who has refused or neglected to bind himself, can set up the instrument as a binding contract against the other party. There was, I think, a condition implied from the nature of the transaction, that the signing of one party should go for nothing, unless the other signed also. But whether I have assigned the proper reason for the rule or not, the conclusion to which I have arrived, that the party who signs cannot be bound, where the execution is thus incomplete, is not only in accordance with the justice of the case, but is well supported by authority.—I conclude therefore that this instrument was void, and that

should be done in the principal's name, but in the former it is sufficient if it be stated to be done *by the agent* for or

neither of the parties was bound by it." *Townsend v. Corning*, 23 Wend. 435.

The same question arose subsequently in another suit, by the same plaintiffs, but against other defendants, upon an instrument the same in form and executed in the like manner, as the one on which the case just cited was founded. There was also a similar endorsement signed by Isaiah Townsend. On a demurrer to the declaration, the Supreme Court of New York gave judgment in favor of the defendants for the reasons stated by Bronson, J. in that case. The judgment was affirmed by the Court of Errors. The leading opinion was delivered by Walworth, Ch., as follows: "The question in this case arises upon a demurrer to a declaration in covenant upon a sealed instrument, stated in the declaration to have been an agreement between the plaintiffs and Isaiah Townsend deceased, by Harvey Baldwin their attorney, of the first part, and the defendants of the second part, whereby the parties of the first part agreed to sell and convey, and the defendants agreed to purchase and pay for certain lots at Syracuse. As we cannot look beyond the declaration for the purpose of ascertaining the real state of facts in this case, we must, for the purposes of the decision which is now to be made, take it for granted, that Baldwin was duly authorized by the plaintiffs and Isaiah Townsend, to make a contract for them and in their names, under seal, to sell and convey the lands mentioned in the instrument declared on, so as to make a valid contract for such sale under the provisions of the present statute of frauds; which statute requires the contract to be in writing and to be subscribed by the parties by whom the sale is to be made, or by their agent lawfully authorized. On the other hand we are not to inquire whether, if there has been an imperfect execution of the contract by the attorney, there has been such an execution thereof as to entitle the plaintiffs to a specific performance in equity. But the point presented for our consideration, upon this writ of error, is a dry question of law, whether the agreement set out in the declaration was executed in such a manner as to authorize the plaintiffs to recover thereon against the defendants, in this form of action, as upon an agreement under seal, between the plaintiffs and Isaiah Townsend deceased, and these defendants. In an agreement not under seal, executed by an agent or attorney in behalf of his principal, and where the agent or attorney is duly authorized to make the agreement, it is sufficient, as a general rule, if it appears in any part of the instrument that the understanding of the parties was that the principal, and not the agent or attorney, was the person to be bound for the fulfilment of the contract. And even in the case of a sealed instrument, executed by an attorney duly authorized by a power under seal, no particular form of words is necessary to render it valid and binding upon the principal, provided it appears upon the face of the instrument that it

in behalf of the principal ; as in the case of a surrender of a copyhold estate by attorney, the entry being that W. and

was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the agent or attorney merely. And where the deed is executed for several parties, it does not appear to be necessary to affix a separate and distinct seal for each, if it appears that the seal affixed was intended to be adopted as the seal of each of the parties. But where it distinctly appears from the deed or instrument that the seal affixed thereto is the seal of the attorney, and not of the principal, the latter cannot be made liable in an action of debt or covenant, as upon a specialty ; nor will such deed or instrument pass any title or interest belonging to him which by law requires a deed or instrument under seal to transfer or discharge it. Thus, in the anonymous case from Moor, (70 pl. 191,) referred to in the opinion of Justice Bronson in this case, where the king's surveyor was empowered by letters patent from the crown to make leases of certain lands for him for life, reserving the ancient rents, and a lease was made by him in the name of the king as the party of the first part, and J. S. of the second part, whereby, as stated in the lease, the king demised the premises to J. S. for life, &c. ; but in the *in testimonium* clause, at the close of the instrument, it was stated that the said surveyor had thereunto set his hand and seal, the court held the lease void, because it was not sealed in the name of the king, but by the surveyor in his own name. That case appears to run on all fours with the one under consideration, so far as regards the question whether the instrument declared on here is to be considered the deed of the plaintiffs, for the concluding clause of the instrument in the present case is, " In witness whereof, the said Harvey Baldwin, as attorney for the parties of the first part, and the said parties of the second part, have hereunto set their hands and seals the day and year first above written. Harvey Baldwin, [L. S.] Caleb Hubbard, [L. S.] D. A. Orcutt, [L. S.]" And the more recent case of *Berkley v. Hardy*, in the Court of King's Bench, in England, (5 Barn. & Cress. 355 ; ante, p. 158,) fully sustains the principle adopted in the case from *Moor's Reports*. For there the plaintiff, Berkley, was not permitted to recover against the defendant who had signed and sealed the lease, and had, in the body of the instrument, covenanted directly and in terms with Berkley ; because it appeared from the face of the instrument that Simmonds, the attorney of Berkley, had sealed the lease in his own name, instead of executing it in the name of Berkley, his principal. The case of *Magill v. Hinsdale*, (6 Conn. Rep. 464,) is undoubtedly a decision in favor of the position assumed by the counsel for the plaintiffs in error, that this agreement was properly executed as the deed of the plaintiffs and of Isaiah Townsend ; for it was there held, that an instrument purporting that the attorney of a corporation, had set his seal thereto, in behalf of the corporation, was sufficient to transfer the legal title of the corporation in real estate, in the same manner as if it

S., by virtue of a letter of attorney from T. C., surrendered, &c. it was held sufficient.^(t) So if the execution of a deed really appear to be in the name of the principal, the form of words used in the execution is *not [*182] material; for in a late case, where the principle was recognized and affirmed, it was deemed sufficient that opposite the seal was written, "for S. B. (the principal,) M.

had been executed under the corporate seal. That decision, however, appears to be in conflict with the whole current of authority both in this country and in England. Although this rule of requiring sealed instruments, when executed by an attorney, to be executed in the name of the principal, and to purport to be sealed with his seal instead of the seal of the attorney, may be considered as merely technical, yet it is one upon which the titles to many estates may depend, and which has been too long established to be now altered by the courts. For that reason I think, the demurrer to the declaration in this case was well taken, and that the judgment of the Supreme Court should be affirmed." *Townsend v. Hubbard*, 4 Hill, 351. The affirmance of the judgment in the above case was unanimous, with the exception of a single senator. See further *Spencer v. Field*, 10 Wend. 87; *Wells v. Evans*, 20 Wend. 251, 256, 257; *Lutz v. Linthicum*, 8 Peters, 165. The strict rule of the common law does not extend to instruments *not* under seal. *The New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56; *Rice v. Gove*, 22 Pick. 158, 161; *Townsend v. Corning*, *ubi supra*; *Townsend v. Hubbard*, *ubi supra*; *Evans v. Wells*, 22 Wend. 324; *post*, 378, *et seq.* In the state of Maine, by act of 1823, a deed by an agent in his own name is valid, provided he had authority, and it appears on the face of the deed that he meant to execute the authority. 2 Kent's Comm. 631, n. b. Where an agent who has authority to execute a contract which is not required to be under seal, nevertheless executes it by deed, this excess does not invalidate the act of the agent. *Lawrence v. Taylor*, 5 Hill, 107, 113; *Tapley v. Butterfield*, 1 Metcalf, 515; *ante*, 157, n. (l)||

(t) *Parker v. Kett*, Salk. 95; 9 Co. 77. || So, of livery of seisin, which like the surrender of a copyhold, is only a ministerial ceremony, or transitory act *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig. Bae. Abr. Leases, I. 10. "Upon general principles it does not admit of a doubt, that an act done by or to the agent of a party of a matter resting *in pais*, is equivalent to its being done by or to the principal." Spencer, J. *Anderson v. The President, &c. of the Highland Turnpike*, 16 Johns. Rep. 86, 89, where it was held that an agreement to accept a collateral thing in satisfaction of a pre-existing debt was executed by a delivery to a person appointed by the party to receive it.||

W. (the attorney.”(u) The most advisable way is, A. B. (the principal,) by C. D. (the attorney,) and this is certainly good.(w)

But though in these cases of mere ceremonial acts it is indifferent in what order the names stand, whether *the principal by the attorney*, or *the attorney for the principal*, yet in the *form of a contract* made by attorney the wording is material. Where an interest passes by the instrument, as in an indenture of lease, it must in terms be conveyed by the principal, in whom alone the interest is ; for the power of attorney, as such, vests no interest in the representative, consequently none can pass from him, and therefore if a lease were made in the name of the attorney, though it were added also *by virtue of a letter of attorney*, or “by A. B. as attorney for C. D.,” it would be a [*183] void lease.(x) A covenant for the *payment of rent, made between the covenantor on the one part, and the plaintiff, as attorney for T. F., on the other, in which the plaintiff for, and in the name, and as attorney for T. F., demised, &c. is void, for being void so as to pass an interest in the land, it is also void as to the reservation of rent.(y)

(u) *Wilks v. Bach*, 2 East, 142.

(w) Per Grose, J. 2 East, 144. ¶ It has been said that it is not necessary to the proper execution of a deed by an attorney in fact, that he should sign his name to it ; the name of the principal alone is sufficient. *Deviny v. Reynolds*, 1 Watts & Serg. (Penn.) Rep. 328. And it seems that where there is one attorney for several principals, it is not necessary to affix to the deed, a separate seal for each, provided it appear that the seal affixed was intended to be adopted as the seal of all. *Townsend v. Hubbard*, 4 Hill, 351.¶

(x) Bac. Abr. tit. Leases, (s. 10.) ¶ Ante, 181, n. (e) ; *Magill v. Hinsdale*, 6 Conn. Rep. 464.¶ The distinction here stated upon the authority of Ch. B. Gilbert corresponds with what is found in *Combe's case*, 9 Co. 77. “If I, as attorney to L. S., deliver you seisin, or I, by force of a letter of attorney, deliver you seisin, that is well done ; but if attorneys have power, by writing, to make leases for years, &c. they cannot make indenture in their own names, but in the name of him who gives them warrant.” And see 1 Roll. Abr. 330, 501 ; Godb. 389.

(y) *Frontin v. Small*, 2 Ld. Raym. 1418 ; 1 Str. 705. ¶ There is no mu-

A bond reciting certain differences between the obligee and the obligor, *as attorney for T. F.*, was conditioned that the obligor should perform such award as the arbitrators therein named should make upon the premises. It was agreed that the submission in this form was not binding upon the principal, though it was resolved to be so upon the obligor.(z)

|| There is no doubt that a person may draw, accept, or endorse a bill by his agent or attorney, and that it will be obligatory upon him as though it were done by his own hand. But the agent in such case must either sign the name of the principal to the bill, or it must appear on the face of the bill itself in some way or another, that it was in fact drawn for him, or the principal will not be bound. The particular form of the execution is not material, if it be substantially done in the name of the principal.(A)||

‡ In bills of exchange and other mercantile instruments drawn, accepted, or endorsed by agents, it is most material that the character of agent should be shown upon the instrument; not that the omission affects in any way the validity of the instrument, but because it renders the agent personally liable, and releases the principal. But of this more fully hereafter.(6)‡

tuality in the contract. A lessee should not be compelled to pay rent for land demised by an invalid lease, any more than a purchaser should be obliged to pay the consideration on an agreement for the sale of land, executed by the vendor in such a manner, as that he could not be bound to a specific performance, or be otherwise liable to the vendee. *Spencer v. Field*, 10 Wend. 88; *Townsend v. Corning*, 23 Wend. 435; *Townsend v. Hubbard*, 4 Hill, 351; ante, 181, n. (s).||

(z) *Bacon v. Dubary*, 1 Ld. Raym. 246; Salk. 70; 12 Mod. 129.||

(A) || *Pentz v. Stanton*, 10 Wend. 271, 276; *Stackpole v. Arnold*, 11 Mass. Rep. 33, 34.||

(6) ‡ Post, Chap. VI. Sec. 1 ‡ || 378, et seq.||

SECTION 4.

Determination of Authority.

It is further necessary to the validity of the execution, that it take place during the continuance of the authority; which leads us to consider, thirdly, The manner in which an authority is determined; which is either by revocation, or by efflux of time, or by performance of the commission.

A power of attorney or other authority is in general revocable from its nature;(A) but there is this exception, viz. where a power of attorney is part of a security for money, there it is not revocable. As where a power of attorney was made to levy a fine as part of a security, it was held not to be revocable.(a) The principle is applicable to every case where the power is necessary to effectuate any security.(b)(1) Therefore where a man assigned all his effects in trust for the benefit of the trustee and his other creditors, and executed a power of attorney to the trustee to [*185] call in his debts for the purposes of that trust, it was held to be part of the security for the payment of

(A) || Revocation of the authority of the immediate agent, is also a revocation of the authority of his sub-agent or substitute. 2 Liv. Pr. & Ag. 305. A power of attorney is revoked by subsequent and inconsistent instructions to the agent. *Copeland v. The Mercantile Ins. Co.* 6 Pick. 198, 202.||

(a) Per Lord Kenyon; *Walsh v. Whitcomb*, 2 Esp. Cas. 565.

(b) Id. ib. || *Raymond v. Squire*, 11 Johns. Rep. 47.||

(1) ‡ It may be laid down as a general rule that an authority coupled with an interest is not, unless the power of revocation be expressly reserved, revocable by the party himself, or by his assignees.‡ || But strictly speaking, a power or authority coupled with an interest is where the grantee has an interest in the estate, as well as in the exercise of the power; as in the familiar case of a power of sale in a mortgage. *Bergen v. Bennett*, 1 Caines' Cas. in Error, 15; *Wilson v. Troup*, 2 Cowen, 236; *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174; S. C. 2 Mason, 244, 250; 2 Liv. Pr. & Ag. 304; ante, 178, n. (g). Hence arises a distinction which may sometimes lead to important results. See post, 187, n. (5).||

the creditors, and therefore not revocable.(c) So where a power of attorney is executed for a valuable consideration, a court of equity will not permit it to be revoked.(d)

‡ The power of revoking an authority may be exercised at any moment before the actual exercise of it ;(A) and therefore, although a contract may have been entered into by a broker, his authority is still countermandable until the requisites for giving a legal validity to it have been fulfilled. Thus, where a broker had entered into a verbal agreement to sell goods, it was held that his authority might be determined at any moment before the signing of the written memorandum required by the Statute of Frauds ;(2) and in like manner the authority of an insurance-broker was

(c) *Walsh v. Whitcomb*, 2 Esp. Cas. 565.

(d) *Bromley v. Holland*, 7 Ves. Jun. 28. ¶ Where A. being indebted to B. in order to discharge the debt executed to B. a power of attorney, authorizing B. to sell certain lands belonging to A. ; it was held that this being an authority coupled with an interest could not be revoked. *Gausson v. Morton*, 10 Barn. & Cress. 731. So if a factor have the possession of goods on which he has a lien for previous advances, and the principal, in consideration that the former will forbear to sue him for such advances, authorizes him to sell the goods for less than the invoice prices, in order to repay himself, such authority will be irrevocable. Parke, B., *Raleigh v. Atkinson*, 6 Mees. & Wels. 670, 676. So, if the principal consign goods to his factor for sale, in consideration of advances made by the latter on the security of those very goods, the authority in such a case will, it is presumed, be irrevocable ; and indeed the same rule is said to be applicable to every case in which the power given to the factor or broker is necessary to effectuate any security. Russ. on Fact. & Bro. 313. If however a factor have a mere lien for previous advances, on goods which have been consigned to him for sale at a certain price, and the principal afterwards authorizes him to sell the goods at a less price, in order to repay himself, this authority, unless conferred for a valuable consideration, such as forbearance or the like, will still be revocable, and the principal will be entitled, within a reasonable time after notice to that effect, to redeem the goods on payment of the factor's claim. *Raleigh v. Atkinson*, ubi supra ; Russ. Fact. & Bro. ubi supra ; and see *Hodgson v. Anderson*, 3 Barn. & Cress. 842. Where there is a failure of the consideration upon which the power of attorney was given, it becomes revocable. *Ex parte Smither*, 1 Deacon, 413.¶

(A) ¶ *Tonkin v. Fuller*, 3 Doug. 300.¶

(2) ‡ *Farmer v. Robinson*, 2 Campb. 339, (n).‡

held to have been put an end to by the express dissent of the principal to the terms of the proposed insurance before the signing of the policy, although the broker had already signed the slip, which is deemed by mercantile courtesy obligatory on the parties.(3)‡

An authority conferred by letter of attorney must
[*186] be executed during the life of the principal, *for a power to represent another can only continue as

(3) ‡ *Warwick v. Slade*, 3 Campb. 127; and see *Bristow v. Taylor*, 2 Stark. N. P. C. 50.‡ ¶ A question may arise whether, when the authority has been partially executed by the agent, the principal can revoke it in the whole, or as to the part which remains unexecuted. Upon this point Mr. Justice Story says; "The true principle would seem to be, that if the authority admits of severance, or of being revoked as to the part which is unexecuted, either as to the agent, or as to third persons, then, and in such case the revocation will be good as to the part unexecuted; but not as to the part already executed. But if the authority be not thus severable, and damage will thereby happen to the agent on account of the execution of the authority *pro tanto*, there, the principal will not be allowed to revoke the unexecuted part, or, at least, not without fully indemnifying the agent. As to the rights of the other contracting party in this last case, they are not affected by the revocation; but he will retain them all, as well as all the remedies consequent upon any violation of them, in the same manner as if no revocation had taken place. Perhaps there is no direct authority in our law, for the support of this proposition. But it stands so clearly approved by natural justice, as well as by the principles of the Roman law, and the jurisprudence of modern commercial nations, that it is difficult to resist it." Story, Ag. §§ 466, 467.

If a factor or broker were instructed by his principal to pay money to a third person, and were, in pursuance of those instructions, to enter into a binding engagement with such third party to pay the money to him, his authority would cease to be revocable. *Brind v. Hampshire*, 1 Mees. & Wels. 365; *Williams v. Everett*, 14 East, 582. So, if a factor in consequence of having received instructions to purchase goods, were to enter into a contract with a third party for such purchases the principal could not afterwards, of his own mere will, recal the authority by virtue of which the factor had so bound himself. 2 Wils. & Shaw, House of Lords' Rep. 599, n. 1. And it would appear, that in the case of a factor or broker living at a distance from his principal, his authority would cease to be revocable, provided he have done some act in pursuance thereof before receiving the letter containing such revocation, even although that letter was actually written before he had done the act in question. *Adams v. Lindsell*, 1 Barn. & Ald. 681, 683; Russ. Fact. & Bro. 312.¶

long as there is some one to be represented.(e) Hence a letter of attorney to surrender a copyhold, &c. after the death of the principal, is void.(f) A payment of sailors' wages to a person having a power of attorney to receive them has been held void where the principal was dead at the time of the payment.(g) † And in another case, where a power was given coupled with an interest, namely, a power to a creditor to sell a share in a vessel, out of which he was to pay his own debt, it was held to be at once revoked by the death of the debtor who had given it. "A power coupled with an interest," said Lord Ellenborough, "cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?"(4) And the same point seems to have been determined in a case in equity, where a power to a creditor to receive a debt, expressly for the purpose of liquidating the claim of the creditor, unaccompanied, however, by any actual assignment of the debt, or by any security to which the power might have been ancillary, was held to be revoked by the death of the *principal.(5)† But on a question whether a [*187]

(e) 1 Bac. Ab. tit. Authority, E. ‖ *Galt v. Galloway*, 4 Peters, 344; *Butler v. Emmett*, 8 Paige, 22; *Houstoun v. Robertson*, 6 Taunt. 448; *Blades v. Free*, 9 Barn. & Cress. 167; ante, 114, n. 3. If a warrant of attorney be given by two, to confess judgment against them, and one dies, judgment cannot be entered up against the other. *Raw v. Alderson*, 7 Taunt. 453. But where an agent having money in his hands belonging to his principal, purchased with it a bill of exchange which he endorsed specially to his principal, who at the time of such endorsement was dead, of which fact the agent was not aware, it was held that the property in the bill passed to the administrator of the principal, and that he might therefore sue upon the bill in that character. *Murray v. The East India Co.* 5 Barn. & Ald. 204.‖ But this does not apply to authorities given by a corporation aggregate. Co. Lit. 52 b.

(f) Sty. 424; Co. Lit. 52 b.

(g) 5 Esp. Cas. 118. ‖ But see *Cassiday v. McKensie*, 4 Watts & Serg. 282, where payment to an agent in ignorance of the death of the principal was held good. And see *Smout v. Ilbery*, 10 Mees. & Wels. 1.‖

(4) † *Watson v. King*, 4 Campb. 272.‡ ‖ S. C. 1 Starkie, 121.‖

(5) † *Lepard v. Vernon*, 2 V. & B. 51.‡ ‖ The doctrine as to the revocation of an authority by the death of the principal, and what is such a

check given by a dying person to a relation, but not present-

power coupled with an interest, as will not expire with the party creating it, was fully considered by the Supreme Court of the United States in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. Rep. 174 ; (S. C. 2 Mason, 244 ; 3 Mason, 294 ; 1 Peters, 1.) It was a case in equity which came up, on appeal from a decree of the Circuit Court of Rhode Island, sustaining a demurrer to the bill. The bill, so far as is material for the present purpose, stated, that Louis Rousmanier, of whom the defendants were the administrators, applied to the plaintiff, in January, 1820, for the loan of 1450 dollars, offering to give in addition to his notes, a bill of sale, or a mortgage of his interest in the brig *Nereus*, then at sea, as collateral security for the repayment of the money. The sum requested was lent ; and, on the 11th of January, Rousmanier executed two notes for the amount ; and on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person ; and, in the event of the said vessel, or her freight being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained also a proviso reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment ; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to Rousmanier : that on the 21st of March, 1820, the plaintiff lent to Rousmanier, the additional sum of 700 dollars, taking his note for payment, and a similar power to dispose of his interest in the Schooner *Industry*, then also at sea : that on the 6th of May, in the same year, Rousmanier died insolvent, having paid only 200 dollars on the said notes : that the plaintiff gave notice of his claim to the defendants, Rousmanier's administrators ; and on the arrival of the vessels, took possession of Rousmanier's interest in them, and the administrators having refused to pay him, he advertised the vessels for sale, by virtue of the powers aforesaid for the purpose of paying the said notes : and that the defendants forbade the sale, and refused to join in any way to enable the plaintiff to avail himself of his security on the said vessels. The bill prayed that they might be decreed to join in a sale of the vessels, or to sell them and pay the notes out of the proceeds. Marshall, C. J. delivering the opinion of the court said : " This instrument [*i. e.* the power of attorney] contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another, depends on the will and license of that other, the power ceases when the will, or this permission is withdrawn. The general rule, therefore, is, that a letter of attorney may at any time be revoked by the party who makes it, and is revoked by his death. But this general rule which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a

ed in his lifetime, could be enforced as a *donatio causa*

contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may in general be recalled at his will; yet if he binds himself for a consideration, in terms, or by the nature of the contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death. This principle is asserted by Littleton, (sec. 66,) by Lord Coke, in his commentary on that section, and in Willes' Reports, (105, note, and 565.) The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and in the manner in which he must execute his authority, as stated in *Coombe's case*, 9 Co. 76. In that case it was resolved, that 'when any has authority as attorney to do any act, he ought to do it in his name who gave the authority.' The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance by a person who was dead at the time, would be a manifest absurdity. This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make and execute a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.—This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is

mortis against the executor, it was said by Lord Lough-

produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and, therefore, cannot in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. He is no longer a substitute acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle. This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term 'power coupled with an interest.' If the word 'interest' thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A. to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B. would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A. to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B. inserted in a conveyance to A. of the thing to be sold, would not be a power coupled with an interest, and consequently could not be exercised after the death of the person making it; while a power to A. to sell, and pay a debt to himself, though not accom-

borough, that if the donee had received the money upon

panied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power has become extinct. But every day's experience teaches us, that the law is not as the first case put would suppose. We know, that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is then a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it—The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime descends to the heir. The power is necessarily to be exercised after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a Court of Chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person. It is then deemed perfectly clear, that the power given in this case is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death."

Is there not some obscurity in the above opinion? Is it consistent with the whole train of decisions, that a mere naked authority can be irrevocable? Was not the power given by Rousmanier such a power as the law declares to be irrevocable by himself, because it vested an interest in the person to whom it was given, to make it available for his own benefit? And is not a power for the purpose of raising money for the payment of a debt due to the grantee of the power, an authority coupled with an interest? This principle, however is clearly deducible from the case,—that, although a power coupled with an interest is not revocable by the principal himself, and expires with him; yet if the thing upon which the power is to be exercised, be given in the first instance to an agent or trustee, and then a power or trust be engrafted upon it, the agent or trustee having the legal estate in the thing itself, and the power being merely collateral, he may execute the authority in his own name, and consequently it is not revoked by the death of the principal. This distinction appears to be taken by Story, J. when the case was first before him in the Circuit Court, (2 Mason, 244.) In

the check immediately after the death of the testator, and before the banker was apprised of it, he was inclined to think no court would have taken it from him.(h)

‡ An authority is also in general revoked by the bankruptcy of the principal.(A) But if it be coupled with an interest, whether legal or equitable, then, as the assignees can take nothing to which the bankrupt had not a good title both at law and in equity, the right of the agent will not be affected by the bankruptcy.(B) Neither, for the

Knapp v. Alvord, (cited *infra*.) Walworth, Ch. said ; “ In the case decided by the Supreme Court of the United States, there was no actual pledge of the property ; but a mere power of attorney was executed authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon that ground, as I understand the case, that Chief Justice Marshall held that the power was not coupled with any interest in the vessels ; and I presume his opinion upon that point would have been different, if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt.”

Where A. upon going abroad, employed an agent to carry on his business, and gave him the full and entire possession and control of his property, with a written power to sell all or any part of the stock and property which might at any time be in his hands, and to apply the proceeds to the security or payment of a specified note endorsed by the agent and a third person, or of any other note given in renewal of the same, or for which the agent might become responsible ; it was held, that the possession of the property being connected with the power for the protection and indemnity of the agent, as well as for other purposes, the agent had a power coupled with an interest, which survived upon the death of A. while he was abroad ; and authorized the agent to sell the property for his protection and indemnity after such death. *Knapp v. Alvord*, 10 Paige, 205.

Where a factor or broker has authority to do an act in his own name, there it would seem, that the death of the principal will not *ipso facto* determine such authority. *Smeut v. Ilberry*, 10 Mees. & Wels. 1, 11 ; Russ. Fact. & Brok. 317.||

(h) *Tate v. Hilbert*, 2 Ves. Jun. 118.

(A) || 2 Kent's Com. 644 ; 2 Liv. Pr. & Ag. 307 ; ante, 114, n. 3. But this does not extend to a mere formal act, which passes no interest, and which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy. 2 Kent's Comm. 644.||

(B) || The bankruptcy of the principal will not affect the personal rights of the agent, or his lien upon the proceeds of a remittance made to him under the orders of his principal but received afterward. *Alcey v. Hotson*, 4 Campb. 525.||

same reason, will the rights of third parties, derived from a power executed after the bankruptcy of the principal, be disturbed, unless the interests of the general creditors would be affected; upon which principle the following case was decided:—A bill of sale had been given of a vessel at sea. By the Registry Act this had the effect of transferring the absolute property in the ship, subject only to be divested in case no endorsement of the transfer were made on the certificate of registry within ten days after her arrival in port. A power was *given to A. to make [*188] this endorsement, and after the execution of the bill of sale and of this power the person who had made the transfer became bankrupt. A. nevertheless, after the bankruptcy, executed the power by making the endorsement; and the Court held, that the power was not revoked by the bankruptcy, the interest having passed by the bill of sale.(6)†

It has been questioned with respect to an agent acting under a power of attorney, whether acts done by him before he knows of the revocation of his warrant, are good against the principal; and it seems that the principal in such case could not avoid the acts of his agent done *bona fide*, if they were to his disadvantage; though he might consent to avoid such as were for his benefit.(i)

In general the credit arising from ostensible employment continues, at least with regard to those who have been accustomed to deal upon the faith of that employment, until they have notice of its being at an end,(k) or till its termination is notorious.(l)

(6) † *Dixon v. Ewart*, 3 Meriv. 322; Buck, 94.4 || 2 Kent's Comm. 644.¶

(i) Per Buller, J.; *Salt v. Field*, 5 T. R. 215.

(k) *Hazard v. Treadwell*, Str. 506; ante, 162.

(l) — *v. Harrison*, 12 Mod. 346; ante, || 170. In the case of a lawful revocation of the power by the act of the principal, it is necessary that notice of the revocation should be given to the attorney; and all acts *bona fide* done by him under the power, prior to the notice of the revocation are binding upon the principal. This rule is necessary to prevent imposition,

The authority of an agent for the purpose of sale is at an end by the sale, and therefore an auctioneer [*189] after the sale has no authority to treat *of the terms upon which a title is to be made.(*m*) † And by usage in some trades, which the courts have recognized as a lawful usage, the authority of a broker to sell expires with the day on which it is given, and as all parties dealing in that trade are presumed to be cognizant of the usage, the principal is not bound by a contract of the broker made after that day.(7)†

and for the safety of the party dealing with the agent ; and it was equally a rule in the civil law. Even if the notice had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such that the public had no just ground to presume a revocation, his acts done under his former power would still be binding upon his principal." 2 Kent's Comm. 644 ; 2 Liv. Pr. & Ag. 308, 310 ; Civil Code of Louisiana, Art. 2998 ; *Trueman v. Loder*, 11 Ad. & Ell. 589 ; *Morgan v. Stell*, 5 Binney, 316 ; *Williams v. Birbeck*, 1 Hoff. Ch. Rep. 359. Where a party dealing with an agent has been informed by the principal of his intention to revoke the appointment of the agent, but the transaction is consummated between the party and the agent, before revocation, or knowledge on the part of the agent of the intention to revoke, the principal is bound by the act of the agent. Bronson, J. "It would be a refinement in law, if not in ethics, to hold a man precluded from accepting that which was rightfully his due, because he happened to know that the debtor did not intend to discharge his obligation." *Lightbody v. The North American Ins. Co.* 23 Wend. 18, 25.¶

(*m*) *Seton v. Slade*, 7 Ves. Jun. 276.

(7) † *Dickinson v. Lilwall*, 4 Campb. 279.¶ An authority must be executed within the period to which it is limited. So, where a real estate was vested in trustees, on trust to convey to the *cestui que trust*, at a particular period, and a power of sale was given to the trustees, "during the continuance of the trust:" the trustees having neglected to convey during the period stated, it was held that they could not after that time execute the power of sale, though the trusts still continued. *Wood v. White*, 2 Keen, 664 ; S. C. 4 Myl. & Cr. 460, 479.

Besides the instances enumerated in the text, there are other ways in which an authority may be determined. (1) If the principal being a feme sole afterward marry. 2 Kent's Comm. 645 ; 2 Liv. Pr. & Ag. 307 ; Story on Bailm. § 206. (2) And it would seem, that if a feme sole be appointed an agent, and she afterward marry, her authority is determined. 2 Kent's Comm. 645 ; Story on Bailm. § 206 ; ante, p. 2. (3) The lunacy

SECTION 5.

Extent of authority.

When a valid subsisting authority is established and

of the principal, is a determination of the authority ; but that is a fact which must be established in some unequivocal manner, as by the finding of a jury under an inquisition *de lunatico inquirendo*. 2 Kent's Comm. 645. The plaintiff having a deposit of money in the bank of the defendants, executed a general power of attorney to A., and afterward became lunatic. A., the attorney, attempted to draw the money thus deposited, out of the bank, but payment was refused on account of the lunacy of the principal, who was then in a lunatic asylum ; but no proceedings had been taken to declare the plaintiff's lunacy : it was held that the power was not revoked. The court said : " Although the authority of an agent may be revoked by the lunacy of his principal, yet the existence of the lunacy, before it can have that effect, must be established by inquisition. There would be no safety in admitting any other evidence of a fact, which is to have an operation so extensive ; and sound policy requires us to adopt this rule. It is conceded by the counsel for the defendants, that the mere existence of lunacy cannot *per se*, operate as a revocation of the power, because the disease being often of a temporary character, may exist, and yet be removed within any given period of time. If the mere fact of lunacy operated like death, to revoke the power instantly, then any acts done under it, during the existence of the disease would be void, even if the parties were ignorant of the principal's situation. This is certainly not the law upon the subject. The mere existence of lunacy never operates to revoke a power, until the fact is properly established by judicial proceedings in chancery. In such a case there can be no objection to allowing the effect, which the lunacy thus proved might have upon the power ; for a committee would then be appointed to take charge of the principal's estate. Due notice would be given, and all the parties having an interest in the subject, would be apprized of the true state of facts, and thus be put upon their guard." *Wallis v. The President &c. of the Manhattan Co.* 2 Hall, 495. So, the lunacy of a partner is not *ipso facto* a dissolution of the partnership. *Jones v. Noy*, 2 Myl. & K. 125. (4) The insanity of the agent is a revocation, for it cannot be presumed that the principal would be willing, that his business should be transacted by a maniac. 1 Bac. Abr. (ed. by Bouvier,) 529. (5) An obvious means whereby the authority of an agent may be determined, is, by his renunciation of the agency ; and this, it is said, may be done by him, even after he has accepted and in part executed his commission. But wherever the agent renounces his agency, he would seem to be bound to give notice of it to his prin-

regularly executed, the remaining inquiry is as to the legal effect of acts done under it.

principal, and if he delay or neglect so to do, he will be liable for all damages which the latter may sustain by reason thereof. Russ. Fact. & Brok. 314; Story on Bailm. § 202. (6) Bankruptcy of the agent may, perhaps, be a revocation, where the act to be done may involve the receipt or expenditure of money on account of the principal; but ordinarily it has not that effect. Story on Bailm. § 211; ante, 83, 84. (7) The death of the agent determines the authority; for this being a personal confidence, it is not to be presumed that the principal intended that it should pass to his representatives, unless there is some special stipulation to that effect. But it would seem, (and such is the doctrine of the civil law,) that if the agent has entered upon the execution of the trust, and left it partially executed and incomplete at his death, his legal representatives would be bound to go on and complete it. 2 Kent's Comm. 643; Story on Bailm. § 202. Payment of the price of goods sold by a deceased factor, to his administrator, does not discharge the purchaser. *Merrick's estate*, 8 Watts & Serg. 402. We have seen that where an authority is given to two or more persons, and one dies, it cannot be executed by the survivor or survivors. Ante, 177. But it has been held that if a warrant of attorney be given to enter up judgment at the suit of two, and one dies, judgment may be entered up by the survivor. *Fendall v. May*, 2 Maule & Selw. 76; *Raw v. Alderson*, 7 Taunt. 453. (8) By the principal divesting himself of all interest in the subject to which the agency attaches. This position can only apply to maritime cases; and perhaps the decision in the case which will be next noticed, may be deemed *inter apices juris*. I refer to *Hussey v. Allen*, 6 Mass. Rep. 163, where it was held that the owners of a vessel, who had parted with their interest, while the vessel was on a distant voyage were not liable for contracts made by the master with persons furnishing supplies for the vessel, although they were equally ignorant of any change of property. Parsons, C. J. delivering the opinion of the court said: "From these facts a general question arises, whether if necessary supplies are furnished to a vessel abroad on a voyage, after the owners of her when she sailed, have legally and *bona fide* sold all their interest in her; but of which sale neither the master, nor the merchant furnishing the supplies, have any knowledge; the original owners are liable in law to the merchant for such supplies. And it is our opinion, that the original owners are not liable to pay for any supplies furnished for the vessel, after they have sold all their interest in the vessel, although neither the master, nor the merchant furnishing the supplies, have any knowledge of the sale. The obligation imposed on owners of vessels abroad, to pay for the necessary supplies furnished to the master, is founded on the principle, *that the master is for this purpose their agent*, and is authorized to bind them in this case; because the supplies are for their use and benefit, and without which their

1. An authority is to be so construed as to include all necessary or usual means of executing it with effect.(a) As an instance illustrative of this maxim, a general bailiff of a manor may make leases at will without any special authority; the reason assigned for which in the books is, because great prejudice and inconvenience would ensue to the lord by absence, sickness, or other incapacity, if he had not that power.(b) But he has no general power to make leases for *years, to which the same rea- [*190] sons do not apply.(c)

vessel cannot proceed on her destined voyage. But when the owners have alienated all their interest in the vessel, *the master ceases to be their agent*, and the supplies are not furnished for their use. When therefore necessary supplies are to be furnished for a vessel on her voyage, and from home, the merchant may furnish them on the credit of the vessel, by taking an hypothecation, or on the credit of the master by his consent, or on the credit of all who are owners at the time the supplies are furnished, because they have the use and benefit of them. But the original owners are exempted from all obligation to pay for such supplies, furnished after the sale, because they are no longer owners, nor interested in the vessel or voyage." And see *Leonard v. Huntington*, 15 Johns. Rep. 298. That a court of equity will, under circumstances, determine the agency, by removing the agent, see *Lawless v. Shaw*, Lloyd & Gould, 154, 172.||

(a) 2 H. Bl. 618. || *Rogers v. Kneeland*, 10 Wend. 219; *Morris v. Coonly*, 21 Wend. 279; post, 241; *Damon v. The Inhabitants of Granby*, 2 Pick. 345; *Sandford v. Handy*, 23 Wend. 267. Nor is it material, in this respect, whether the power be general or special. Post, 201, n. But it is not to be so construed, unless the language is express, as to authorize the agent—a question which of course, can only arise between the agent and his principal—to act in any other way, than according to the law of the place where the power is to be executed. "The law will never presume that parties intend to violate its precepts." *Owings v. Hull*, 9 Peters, 608, 628. An authority given by statute to public agents, vests them, by implication, with all the ordinary means for carrying into effect the objects contemplated by the legislature. *The United States v. Wyngall*, 5 Hill, 16, 19. The rule applies to a company incorporated by statute. *Munn v. The President &c. of the Commission Co.*, 15 Johns. Rep. 44; ante, 155, n. (a).||

(b) Bac. Ab. tit. Leases, (I. 8.) || "It may deserve consideration" says Mr. Justice Story, (Agency, § 101, n. 1,) "whether this doctrine is applicable to the modern cases of a lease at will, when construed to be a lease from year to year, or to any leases except those which are strictly leases at will."||

(c) Ib. || Nor can the committee of a lunatic make a lease for years,

[*191] *So a letter of attorney to sue for, receive, and recover a debt, authorizes the attorney to arrest the

except by order of the court of chancery. *Ibid.* The overseer of a plantation, as such, has no right to bind his employer, by the purchase of articles which he may suppose necessary. Such authority is not necessary to enable him to perform the duties incident to his station, and therefore he cannot be presumed to be invested with it. *Fisher v. Campbell*, 9 Porter's (Alabama) Rep. 210.¶ [It should seem that a receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *Doe ex dem. Marsack and others v. Read*, 12 East, 57.]

‡ It is so settled: but a mere receiver of rents, as such, has no authority to determine a tenancy by notice. Whether, supposing the notice not to have been properly authorized when given, a subsequent recognition will have the effect of making it valid, is a question on which there seems to be some difference of opinion. In *Roe v. Pierce*, 2 Campb. 96, a verbal notice had been given by the steward of a corporation. It was objected, that the notice was insufficient, inasmuch as it ought to have been under the common seal of the corporation, or at least by a person appointed under that seal, of which there was no proof in the case: but Macdonald, C. B. held the notice sufficient, adding, that the corporation by bringing the ejectment showed that they authorized and adopted the act of the steward. ¶ *Ante*, 156, n. (f).¶ Again, in *Goodtitle v. Woodward*, 3 B. & Ald. 689, a notice to quit given by an agent for several trustees jointly interested, acting under a written authority, signed by some only of the trustees at the time of giving of the notice, and by the rest subsequently, was held sufficient, on the ground that the subsequent recognition by all gave effect to the authority.⁽¹⁾ But in the recent case of *Doe v. Walters*, 10 B. & C. 626, some doubt was thrown on these authorities. The case was this: a notice to quit had been given by one who, so far as appeared in evidence, had no express authority from the landlord, but who had the general management of his affairs during his then residence abroad, and who had received rent from the tenant, though he had not let him the land. At the trial the learned judge was of opinion, that such employment gave an implied authority to determine the tenancy by notice, and under his direction a verdict was found for the lessor of the plaintiff; but on motion for a nonsuit or new trial, the Court of King's Bench were unanimous, that the question of authority ought to have been left to the jury; and some of the learned judges intimated an opinion that the evidence of authority was extremely

(1) ‡ The decision may be supported on another ground; for although at that time it was supposed that a notice by one of two joint tenants was not valid according to the case of *Right v. Cuthell*, 5 East, 491, yet the court has since determined that such notice is sufficient. *Doe v. Summervett*, 1 B. & Ad. 135.]

debtor.(d) And so a broker employed to get a policy effected may adjust the loss,(e) † and do all which is necessary for procuring the adjustment.(A) Thus it has been decided, that an agent who underwrites and settles losses for another, has an implied authority from him to refer "a dispute about a loss to arbitration.(2)† But [*192]

slight. It had, however, been urged in the argument, that the bringing of the ejectment was a ratification of the authority, as to which Littledale, J. declared his opinion, that if the agent had not authority to give such notice at the time when it was given, or at least when the half-year mentioned in it began to run, no subsequent recognition of his authority could make it valid; and Parke, J. declared himself dissatisfied with the reasons given for the decision in *Goodtitle v. Woodward*, and all were clearly of opinion that to give validity to a notice by a subsequent recognition, the ratification must at all events be given before the bringing of the ejectment, or rather the day of demise laid in the declaration.‡ || In general, the rights of parties must be determined according to the state of facts as they existed at the time of bringing the suit. And besides, there is a manifest difference between a case in which a party seeks to avail himself by subsequent assent of the unauthorized act of his own agent, in order to enforce a claim against a third person; and the case of a party acquiring an inchoate right against a principal, by an unauthorized act of his agent, to which validity is afterward given by the assent, or recognition of the principal.||

(d) 1 Roll. Rep. 390; Palm. 394. || So, an attorney who has an authority to convey land, has necessarily the power to receive the purchase money. *Peck v. Harriott*, 6 Serg. & Rawle, 149. So, an authority to make contracts for the sale of lands will authorize the agent to receive so much of the purchase money, as is to be paid in hand, on the sale, as an incident to the power to sell. *Yarby v. Grisby*, 9 Leigh's (Va.) Rep. 387. So, it has been held, that an agent having authority to make a contract, was also authorized to modify or waive the contract; with the restriction, it should seem, that such modification, or waiver, is for the benefit of his principal. *Morris v. Coonly*, 21 Wend. 279; see post, 278, et seq.|| In the case of *Bailey v. De Walkiers*, 10 Ves. 441, the defendant was abroad, but had left in England a general power of attorney to act for him, and to appear, defend, and compromise suits, execute deeds, &c. The answer was ordered to be put in by the attorney, without signature; it being a case where it was not necessary that the answer should be upon oath.

(e) *Richardson v. Anderson*, 1 Campb. 43, n. || Post, 281.||

(A) || So, he may abandon in case of loss. *The Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268.||

(2) [*Goodson v. Brooke*, 4 Campb. 163.] || But an insurance broker has

an authority to receive and pay partnership debts, on a dissolution of partnership, does not give authority to accept or endorse bills in the joint names of the partners.(f)

[Neither does a letter of attorney to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases and appoint substitutes, authorize the attorney to negotiate bills received in payment, or to endorse them in his own name; and a general power to transact all business has no greater effect.(3)]

no implied authority to pay to the assured losses, either total or partial, for the underwriter who employs him. *Bell v. Auldjo*, 4 Doug. 48.¶

(f) *Kilgour v. Finlayson*, 1 H. Bl. 155. ¶ After the actual dissolution of a partnership between A. and B, A. accepts a bill in the name of the partnership, bearing date before the dissolution; an endorsee who takes the bill without notice of the dissolution, cannot enforce the bill against B: and a distinction was taken between this case, and the case of goods supplied after the dissolution of partnership, by one who has been in the habit of supplying goods to the firm. *Wrightson v. Pullan*, 1 Stark. 375.¶

(3) [*Hogg v. Snaith*, 1 Taunt. 347; and see *Hay v. Goldsmid*, there cited,] † So in *Murray v. East India Company*, 5 B. & A. 204, the court thought it quite clear that a power of attorney authorizing the agent to sue for, recover, and receive by all lawful ways and means whatsoever, all moneys, debts, and dues whatsoever, and to give sufficient discharges, did not authorize him to endorse bills for his principal. And see *Gardiner v. Baillie*, 6 T. R. 591, ante, p. 178 and 179, note (5), on *Howard v. Baillie*.† ¶ *Rossiter v. Rossiter*, 8 Wend. 494. The bailiff of a large farming establishment, through whose hands all payments and receipts take place, has no implied authority to pledge the credit of his employer by drawing and endorsing bills of exchange in the name of the latter: nor in the absence of all direct evidence of authority, does the nature of the employment of such a bailiff furnish any ground for inferring the existence of such an authority upon slight, or upon any other than clear and distinct evidence of assent or acquiescence. *Davidson v. Stanley*, 2 Man. & Gran. 721. So, a letter of attorney empowering an agent to negotiate, compromise, adjust, determine, settle, and arrange all differences and disputes between the principal and all persons whatever, and to execute and sign in the name of the principal, any release, covenant, or conveyance of any part of the principal's estate, and to give and receive discharges, receipts, &c. has been held not to authorize the agent to confess a judgment in the name of the principal. *Lagow v. Patterson*, 1 Blackford's (Indiana) Rep. 252.

So, the resident agent of a mining company, who is appointed by the directors to manage the mine, has not, in virtue of such an agency, an im-

plied authority from the shareholders to borrow money upon their credit in order to pay the arrearages of wages due to the laborers, however urgent the necessity may be, in order to avoid a distress upon the materials of the mine therefor. And Parke, B. in this case said: "This is an action brought by the plaintiffs, who are bankers, to recover from the defendant, as one of the proprietors of the Travolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now, the extent of the authority conferred upon the agent by his appointment was this only,—that he should conduct and carry on the affairs of the mine in the usual manner. There is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible; first, on that of a special authority given to the agent to borrow money; and, secondly, on the assumed principle, that every owner who appoints an agent for the management of his property, must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money, for the purposes of the mine, had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then, as to the second ground, it appears that the learned judge told the jury, that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honor of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers, how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is, that the law invests the master with power to raise money, and by an instrument of hypothecation, to pledge the ship itself, if necessary. If that case be analogous to this, it follows, that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion that the agent of this mine had not the authority contended for." *Hawtayne v. Beurne*, 7 Mees. & Wels. 595.

So, where disputes existed between A. and B. his solicitor, receiver, and confidential agent, which involved long and intricate matters of account, and A. gave a letter of attorney to a third person, to settle any accounts in which he had an interest, and to compromise any claims which he might

‡ Indeed all written powers, such as letters of attorney, or letters of instructions, receive a strict interpretation ;(A) the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect. The following case will fully illustrate this proposition : *Munnings* was a [*193] *merchant carrying on business on his own account, and also engaged in speculations jointly with *Rothery*, *Burleigh*, and others, went abroad on the partnership business, having given a power of attorney to *Rothery*, *Burleigh*, and *S. Munnings*, his wife, "jointly and severally for him and in his name and to his use, to sue for and get in moneys and goods, to take proceedings and bring actions, to enforce payment of moneys due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions, endorse, negotiate and discount, or acquit and discharge the bills of

have ; it was held that such an authority would not empower that third person, to make an agreement, without the production or examination of any account, that a gross sum should be paid to B. in lieu of all his demands on A. *Jenkins v. Gould*, 3 Russ. 385.

Attorneys at law, having a discretionary power confided to them by creditors, to collect a debt, may, in the exercise of their discretion, take security, instead of enforcing an immediate collection by suit ; or, may assent to an assignment by the debtor for the benefit of creditors, and bind their clients thereto, as within the scope of the authority, thus confided to them. *Gordon v. Coolidge*, 1 Sumner, 537. Where an attorney has obtained a judgment the recovery of which is doubtful, it seems that he is authorized by his general retainer to discharge the judgment upon receiving a part thereof, and security for the payment of the residue. But where the debt is fully secured by the levy upon property of the defendant more than sufficient to satisfy the judgment, the attorney is not authorized without a special authority from his client, to discharge the lien of the judgment and execution without receiving payment of the debt in full : and if the client repudiates the transaction immediately, and gives up the securities taken by the attorney, the judgment will not be considered as discharged against the defendant therein who knew the facts, and had therefore legal notice that the attorney exceeded the authority which he possessed, under a general retainer in the suit. *Benedict v. Smith*, 10 Paige, 127.¶

(A) ¶ *North River Bank v. Aymar*, 3 Hill, 262 ; *Cobbold v. Chilver*, 4 Mann. & Gr. 62.¶

exchange, promissory notes, or other negotiable securities, which were or should be payable to him, and should need and require his endorsement; to sell his ships, execute bills of sale, hire on freight, effect insurances, buy, sell, barter, exchange, export and import all goods, wares, and merchandizes, and to trade in and deal in the same in such manner as should be deemed most for his interest; and generally for him, and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and other acts, deeds, matters, and things, as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and concerns, and as he might or could do if personally acting therein." *Some time afterwards [*194] he sent another power to his wife, separately authorizing her, among other things, "for him and on his behalf to pay and accept such bills of exchange as should be drawn or charged on him by his agents or correspondents, as occasion should require, &c. and generally to do, negotiate, and transact the affairs and business of him, *Munnings*, during his absence, as fully and effectually as if he were present and acting therein." *Burleigh* corresponded with the defendant, and acted as his agent, both before and after the receipt of this power. *Munnings*, while abroad, employed part of the produce of the joint speculations in his individual concerns; and during his absence, *Burleigh*, for the purpose of raising money to pay to creditors of the joint concern who were become urgent, drew four bills of exchange upon *Munnings*, which were accepted by the procuration of his wife, and the proceeds applied in payment of partnership debts. Another bill was afterwards drawn in order to raise money to take up those bills, which last bill was drawn by *Burleigh*, payable to his own order, and accepted in the following form: "Accepted per procuration *G. G. H. Munnings, S. Munnings*," and was discounted by Messrs. *Attwood & Co.* bankers in London. *Munnings* having refused to pay the bill, *Attwood & Co.*

brought an action against him, and the question was, whether under either of the before-mentioned powers [*195] *S. *Munnings*, the wife, had authority to bind her husband by this acceptance. Bayley, J. "This was an action upon an acceptance importing to be by procuration, and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority.(A) The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly : by the first of the powers in question the defendant gave to certain persons authority to do certain acts for him, and in his name, and to his use : it is rather a power to take than to bind, and looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly ; it contains no express power to accept bills, nor does there appear to have been an intention to give it. The first power therefore did not warrant this acceptance. The second power gave an express authority to accept bills for the defendant and on his behalf. No such power was requisite as to partnership transactions, for the other partners might bind him by their acceptance. The [*196] words therefore must be confined *to that which is their obvious meaning, viz. an authority to accept in those cases where it was right for him to accept in *his individual capacity*. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents, but the drawer of the bill in question was not his agent *quoad hoc*. The bills are to be accepted too as occasion shall require. It would be dangerous to hold, that the

(A) || Post, 202.||

plaintiff in this case was not bound to inquire into the propriety of accepting; he might easily have done so by calling for the letter of advice, and I think he was bound to do so. For these reasons I am of opinion that judgment of nonsuit must be entered.”(4)

On the other hand, in a still more recent case, where certain persons had commissioned an agent to carry on for them mining speculations in America, had furnished him with instructions which contemplated the making of purchases and investments on the most extensive scale, and had given him an open letter of credit, authorizing him to draw on them to the amount of 10,000*l.* in the whole, and a letter of attorney conferring very large powers—among other things, to enter into, transact, *complete*, and execute contracts, &c. for lease or purchase of mines, ore, &c. and to conduct, manage, and carry on the working of such mines; to purchase all necessary tools, &c. *and [*197] to erect suitable buildings, &c.; the Court of Common Pleas considered, that the agent had an authority, necessarily implied in the terms of his power, to raise money for carrying into effect the objects of his commission, and consequently held the principals liable to repay a sum of 1500*l.* (beyond the 10,000*l.* obtained on the letter of credit,) which the agent had raised by bills on his principals—there being no evidence that the letter of credit was shown to the person who discounted the drafts, or that he had any knowledge of the previous advances made.(5) And in another case, a power for agents abroad to borrow money for the purposes of an association was implied as against a director of the association, although the letter of instructions authorizing them to draw bills, &c. was given in such a form as to be binding only on the individual trustees who had signed it.(6)†

(4) † *Attwood v. Munnings*, 7 B. & C. 278 † || S. C. 1 Mann. & Ryl. 66. And see the strictures upon this case, of Mr. Justice Cowen, *North River Bank v. Aymar*, 3 Hill, 262, 271.||

(5) † *Withington v. Herring*, 5 Bingh. 442.†

(6) † *Ducarrey v. Gill*, 1 M. & M. 450.† || “Where the authority is con-

An agent employed to get a bill discounted may, unless expressly restricted, endorse it in the name of his employer, so as to bind him by that endorsement.^(g) So a servant entrusted to sell a horse may warrant, unless forbidden.^(h) [And it is not necessary for the party insisting

ferred by informal instruments, such as letters of advice, instructions, or loosely drawn orders,—especially where they are general in their terms—they will be more liberally construed, according to the necessities of the occasion, and the material, or ordinary, or reasonable course of the transaction; and it appears that, even where such an authority is given to an agent for his own benefit, it will not be construed strictly, provided its being liberally construed will not alter the situation of the principal. But if this be the case, it will be otherwise; and therefore, where the defendant, by letter, authorized his agents B. & J., to whom he was indebted, to effect a policy of insurance on his life in their own names, and they, having subsequently taken a third party into partnership, caused the policy to be effected in the names of the three; it was held that this was not a proper execution of the authority, and that the premiums paid on this policy could not be recovered from the principal as money paid to his use." *Russ. Fact. & Bro.* 49, 50; citing *Barron v. Fitzgerald*, 8 Scott, 460, 468; and see ante, p. 178, n. (g).]

(g) *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177.

(h) 5 Esp. 75; 3 T. R. 757; § post, 202, 385. The position that an agent, factor, or servant had authority to warrant property which he was employed to sell was denied by the Supreme Court of New York in the following case.—The declaration, in an action on the case, stated that the defendants were the owners of a certain ship of which G. was the master, and also the factor and agent of the defendants, by them generally authorized to sell the ship to any person in the same manner as they themselves might and could; that the plaintiff bargained with G. for the purchase of the ship, and while bargaining the said G. did deceitfully and fraudulently affirm to the plaintiff that the ship was a registered vessel, according to the act of Congress concerning the registering and recording of ships or vessels, and the plaintiff giving faith to such false and fraudulent representation agreed to purchase the ship for 10,000 dollars, to be paid in bills of exchange; and that the said G. deceitfully and falsely sold the ship as aforesaid, and the plaintiff purchased and paid as aforesaid; whereas in fact, at the time, the ship was not registered according to the act aforesaid, but was a licensed coasting vessel only which G. well knew. There was an averment of special damage. The defendants demurred generally, and the court sustained the demurrer. "*Per Curiam*. The agent of the defendants is stated to have been specially authorized by them, to sell the ship in the same manner that they themselves might have sold her. This is all the authority given, and G. was consequently nothing more than a special

agent constituted for that particular end. The plaintiff was, therefore, not to know or infer any authority beyond what was given, and if the agent exceeded that authority when he made the representation in question, his principals were not bound. This distinction between a special and general agent was laid down in the case of *Penn v. Harrison*, (*supra* and *post*, 202,) and it is founded upon just and reasonable principles. The limitation to the powers of a general and known agent cannot be known, unless specially communicated, and third persons ought not to be affected by any private instructions. G. certainly exceeded his power to sell when he made the false affirmation and representation charged by the plaintiff. A power to sell does not of itself convey a power to warrant. This was so decided in *Nixon v. Hyserott*, (*ante*, 178, n. h.) The remedy for the plaintiff lies against the agent, and not against the defendants. The defendants are, therefore, entitled to judgment." *Gibson v. Colt*, 7 Johns. Rep. 390 ; and see *Jeffrey v. Bigelow*, 13 Wend. 521.

But the decision in *Gibson v. Colt*, has been since shaken, if not entirely over-ruled by the same court.—In *assumpsit* on a warranty, it was proved at the trial, that the plaintiff purchased of the defendant's broker 124 square bales of cotton by sample ; and the defendant consummated the sale by taking a note. The broker swore that he had no authority to warrant ; but acted as broker for the defendant in selling a large quantity of cotton of which the cotton in question was a part. It appeared not to be the general practice, in the city of New York, to sell cotton by sample, though this was sometimes done. The cotton turned out to be much inferior to the samples. The judge who tried the cause charged the jury (*inter alia*) " that a power to sell did not imply a power to warrant ; and that the defendant was not bound by a sale by sample, unless he knew that the sale was thus made when it was consummated by his acceptance of the plaintiff's note. There was a verdict for the plaintiff, merely for nominal damages, (which was probably taken in that form by arrangement,) and on motion of the plaintiff a new trial was granted ; thus leaving it for a subsequent jury to give the plaintiff adequate damages for the breach of the implied warranty. Savage, C. J. who delivered the opinion of the court said : " The authority of a broker to bind his principal, is not, in all cases, confined to the power which the principal intended to confer on him. The interests of the mercantile world require that he should bind his principal within the limits of the authority with which he has been apparently clothed in respect to the subject matter of the sale. In the case of *The Monte Allegre*, (9 Wheat. 644,) Thompson, Justice, says, ' A merchant who employs a broker to sell his goods, knows, or is presumed to know, the state and condition of the article he offers for sale. And if the nature and situation of the property is such, that it cannot be conveniently examined in bulk, he has a right, and it is for the convenience of trade that he should be permitted to select a portion, and exhibit it as a specimen or sample of the whole ; and that he should be held responsible for the truth of such representation. The broker is his special agent for this purpose, and goes into the market with authority to bind his principal. In such cases, if the

article does not correspond with the sample, the injured purchaser knows where to look for redress ; and the owner is justly chargeable with the loss, as he was bound to know the condition of his own property, and to send out a fair sample, if he undertook to sell in that way.' This doctrine is supported by abundant authority ; and decides, that the broker had power to sell by sample, and that a sale by sample is a warranty that the bulk shall correspond with the sample.—In this case, it is not denied that the defendant employed the broker to sell the cotton in question. His employment was a general one. There was no restriction as to the mode of sale, whether by sample or otherwise. He had authority to sell as cotton was sold in the ordinary course of business. It appears that the most usual sales of cotton were by inspecting the bulk ; but that it was unusual to sell by sample. The broker no doubt however, had authority to sell by sample if he thought proper ; and as a sale by sample is itself a warranty that the bulk corresponds with the sample, he was authorized, by virtue of his employment, unrestricted in the mode to be adopted by him, to bind his principal by such a sale." *Andrews v. Kneeland*, 6 Cowen, 354. And see *Sandford v. Handy*, 23 Wend. 260. So, in a still later case, which was an action on a promissory note taken by an agent of C. and D., for the sale of pumps, of one N., to whom the agent had sold a pump ; the defence that the agent had warranted the pump for which the note was given, and that the pump did not answer the warranty, and was in fact good for nothing, was rejected by the inferior court ; but the Supreme Court reversed the judgment, on the ground of the exclusion of proper evidence. Bronson, J. in delivering their opinion said ; " On the facts proved and offered to be proved there is a good defence to the note, and the only question is, whether that defence can be set up against these plaintiffs. D. was engaged in selling pumps. He professed to be acting as the agent of the plaintiffs, and took all the notes payable to them. The plaintiffs are suing upon one of the notes, and they give no account of how they came by it. Upon this state of facts I think the jury would have been warranted in finding that D. sold the pumps as the agent of the plaintiffs. And if he was in fact agent, then the plaintiffs were original parties to the note, in substance as well as form, and the defence should not have been excluded. There is no direct proof that D. had authority to warrant the pumps, or make any representation concerning their quality or condition. But a warranty—and so of a representation—is one of the usual means for effecting the sale of a chattel ; and when the owner sells by an agent, it may be presumed, in the absence of all proof to the contrary, that the agent has been clothed with all the usual powers for accomplishing the proposed end. So long as the agent is acting within the general scope of his authority, persons dealing with him are considered as dealing with the principal. I will not stop to inquire whether D. is to be regarded as a general or special agent ; for if he was only a special agent, his authority to warrant the quality or condition of the thing sold would be presumed until the contrary appeared. The plaintiffs rely on *Gibson v. Colt*, (*supra*) but that case was much shaken, if not entirely overthrown, by the decision

on the *warranty to show that he had any special [*198] authority for that purpose.(7)]

‡ It should seem, also, that a banker may *negotiate* bills paid in by a customer and endorsed by him, if the state of the customer's account render it reasonable for him to do so.(8)‡

The extent or scope of an authority is to be gathered from the commission by which it is given. And the construction of mercantile commissions, like that of other mercantile instruments, is to be assisted by the usages of trade, and for that purpose the evidence of persons conversant in mercantile affairs is resorted to.(i) Therefore a commis-

in *Sandford v. Handy*, (*supra*;) which is also an authority for saying that the principal will not be affected by the fraudulent representations of the agent in making the sale." *Nelson v. Cowing*, 6 Hill, 336; and see *Skinner v. Gunn*, 9 Porter's (Alabama) Rep. 305.

Although a warranty given by a person entrusted to sell, *prima facie* binds the principal, the warranty of a person merely entrusted to deliver the thing sold, is not *prima facie* binding on the principal, but an express authority must be shown; and, therefore, where a horse had been sold by A. to B., and A.'s servant on delivering the horse to B., made certain statements, and signed a receipt for the price of the horse, containing a warranty, it was held in an action on the warranty, that A. was not bound by the statements or receipt of the servant, as no express authority to give the warranty was shown. *Woodin v. Burford*, 2 Crompton & Meeson, 391, 394; Tyrw. 264; cited 2 Steph. N. P. 1293. So likewise where on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant who was sent with the receipt to the agent of the other party, inserted at his request, but without a special or general authority from his master, warranted sound "to the regiment," it was held that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands. *Strode v. Dyson*, 1 Smith, 400; 2 Steph. N. P. 1293. An auctioneer has no authority to warrant goods sold by him, unless specially authorized to do so; and in judicial sales there is no warranty express or implied. *The Monte Allegre*, 9 Wheat. 616.¶

(7) [*Alexander v. Gibson*, 2 Campb. 555. See also the case of *Runquist v. Ditchell*, *ib.* 556, n. (a); 3 Esp. N. P. C. 64, S. C.]

(8) ‡ *Thompson v. Giles*, 2 B. & C. 429, per Bayley, J.‡

(i) See an instance *Ekins v. Maclish*, Ambl. 185, where Lord Hardwicke examined merchants as to the extent of an agent's authority under the particular words of his commission.

‡ The construction of a written instrument, whether mercantile or other-

sion to a factor to sell is now held to give him a power to sell upon credit in those trades where that is the usual course of dealing.^(k)

2. There may be many cases, as elsewhere observed, in which the acts of an agent, though not in conformity to his authority, may yet be binding *upon his employer, who is left in such cases to seek his remedy against his own agent.^(l) Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being *general* or *special*. By a *general* agent is understood, not merely a person substituted in the place of another for transacting all manner of business (since there are few instances in common use of an agency of that description,^(m)) but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain [*200] contracts, and the like.⁽⁹⁾ *An authority of this

wise, is for the court, and not for a jury, to give. The court, however, may, where the construction is doubtful, receive evidence in aid of its judgment.† ¶ Ante, 27, n. *Mechanics Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326; *The Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 364; *Peisch v. Dickson*, 1 Mason, 12; *Barber v. Brace*, 3 Conn. Rep. 9, 13.¶

(k) 12 Mod. 514; Willes, 407, ante, ¶ 26; 1 Campb. 259, post, ¶ 212.¶

(l) Ante, Ch. I. ¶ p. 25.¶

(m) Sir Philip Sidney gave a letter of attorney to Sir Thomas Walsingham to act and sell all his lands, and all his goods and chattels; and this was held good. 1 Salk. 96.

(9) ["A general authority does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." Per Lord Ellenborough, in *Whitehead v. Tuckett*, 15 East, 408.] ¶ Ante, 2, n. 2.¶

† A general authority arises from a general employment in a specific capacity—such as factor, broker, attorney, &c. When we can say of any one that he is A.'s broker, or A.'s factor, or A.'s attorney, he has then a *general* authority in the sense in which it is used in the text. But, of course, this does not imply that he has an *unlimited* or *unrestrained* authority. A. may give his broker, or his factor, or his attorney, any instructions that he pleases, and the effect will be this: *as between himself and his broker, &c.* any deviation from these instructions will render the latter

accountable to him for any loss he may sustain thereby ; but, as *regards himself and third parties*, who may have dealt with the broker, &c. any limitation of the authority, not communicated to them, can have no effect. A third person has a right to assume, without notice to the contrary, that the person whom A. employs generally as his broker, &c. has also an unqualified authority to act for his principal in all matters which come within the scope of that employment. In the case of a particular agent—one, that is, whom A. may have employed specially in that single instance—no such assumption can reasonably be made. It then becomes the duty of the party dealing with one whom he knows to be acting for another in the transaction, to ascertain by inquiry the nature and extent of the authority ; and if it be departed from or exceeded, he must be content to abide the consequences. The distinction thus pointed out is perfectly consonant with right reason, and if duly attended to will satisfactorily explain all the cases which follow in the text, and is further illustrated by that of *Whitehead v. Tuckett*, mentioned above. || Mr. Justice Story has quoted the whole of the preceding part of this paragraph, giving it the approbation to which it was entitled. Agency, § 127, n. 1,||

Sill & Co., brokers, had sold sugars of their principals at a price which, it was contended by the principals, was under the amount limited by their instructions. The principals had consequently taken possession of a part of them which remained undelivered ; and the purchasers brought an action of trover, in which they recovered. “ *Sill & Co.*” said Lord Ellenborough, “ were *general agents*, for they bought and sold in a multitude of instances in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant [the principal] : and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the interposition of any check.”

|| Mr. Russell, in his able *Treatise on Factors and Brokers* 75, et seq., says : “ It is believed that none of the cases in our books, which have reference to the powers of general agents, contain an express definition of that term ; but a comparison of the various decisions and *dicta* which are to be found on the subject would seem to lead to the conclusion, that by the term, *general agent*, in our law, is meant ; either, first, a person who is appointed by the principal to transact all his business of a particular kind ; or, secondly, an agent who is himself engaged in a particular trade or business, and who is employed by his principal to do certain acts for him in the course of that trade or business. In both these cases the agent will,—if there be no limitation of his authority known to third parties,—be taken, as to them, to be a general agent, and will, therefore, have the power to bind his principal by all contracts entered into with them, which are within the scope of his ordinary employment.—The reason of this rule is, that strangers can look only to the acts of the parties, and not to the private communications which pass between a principal and his agent ; and this being the case, it follows, that where the principal has on former occasions authorized or re-

cognized similar acts of his agent, or where the agent is himself employed in a certain business, and is retained by the principal to do certain acts for him in the usual course of that business, strangers who have no notice to the contrary, will be at liberty to assume that, in the one case, the principal has, in the transaction in question, accredited the agent to the full extent of his previous employment; and that, in the other, he has conferred on him all the powers usually possessed by persons engaged in the same business as himself. "If a person," says Lord Ellenborough, "authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority; and he may bind his principal within the limits of the authority with which he has been apparently clothed with respect to the subject matter." (*Pickering v. Busk*, 15 East, 43.) And so it was said in another case;—whatever the duty of an agent may require him to do in the business of his employers, must be presumed to be done with their knowledge and direction. (*Ex parte Machul*, 1 Rose, 447.) From this then it appears, that a general agency is constituted, not by the authority which the agent actually receives from his principal, but by that which the latter allows the agent to assume. And indeed there would be no safety in mercantile transactions were it otherwise. Accordingly it will be for the jury to determine to what extent the principal has accredited his agent; and if they find that he has been enabled by the former to hold himself out to the world as possessing a certain authority, he will be bound by the exercise of that authority, whether the agent really possessed it or not." The following cases are stated at some length, as elucidating the principles above referred to.

In an action of *assumpsit*, the plaintiffs sought to recover as endorsees of two bills of exchange drawn by G. J. & Co., on E. Norton & Co. the defendants, payable to G. & W., at sixty days after date. The acceptances on each of the bills was in this form:—"E. Norton & Co.—Per A. G. Cochrane;" and was in Cochrane's hand-writing. On the trial, Henry Norton testified that he was the general agent of E. Norton & Co. financial as well as otherwise, they not interfering in the business, but being mostly engaged elsewhere; that with their knowledge and assent, he had been in the habit of drawing drafts, making notes and endorsements for them; though by the written articles of co-partnership between E. Norton and his associate, the witness's power was more limited. He also testified that he directed Cochrane, who was the book-keeper of E. Norton & Co. to accept the bills in question. The counsel for the defendants moved for a nonsuit on the ground that the acceptances were made without authority, which was denied by the Circuit Judge whose decision was sustained by the Supreme Court upon a bill of exceptions. Cowen, J. "Henry Norton, it is said, did not appear on the proof to have had any adequate power to accept. There was however, at least, evidence of authority sufficient to go to the jury; and all the judge did, on this point being started, was to refuse a nonsuit. I admit that the powers conferred on him by the defendants' articles of co-partnership did not reach accommodation acceptances; nor

did it appear that he had ever made such an acceptance before. But he said he was the general agent of the defendants' firm, having the sole management of the business; and had, with the defendants' knowledge, drawn drafts and made notes and endorsements for them. True, he did not mention the specific act of acceptance; but his general powers in the business, and the usage of putting their names to commercial paper in all other shapes, was the same thing, and calculated to raise an inference in the public mind, that he had such a power as to this. It is not necessary, in order to constitute a general agent, that he should before have done an act the same *in specie* with that in question. If he have usually done things of the same general character and effect, with the assent of his principals, that is enough. A. holds himself out to the world as B.'s partner; this authorizes B. to do in the name of both, all things which one partner can do in the name of the firm; and among others, to draw, accept, and endorse bills and notes. This is on the principle that one partner is the general agent of the concern. Any other agent recognized as holding the like power, may do the same thing. The agency of H. Norton extended to the whole business of the defendants. Neither of the latter pretended to interfere. Whatever transaction, therefore, the world might regard as pertaining to that business,—and clearly an acceptance is one,—ought to bind the firm. It is like the case stated by Malyne, (*Lex Merc.* p. 264,)—a known servant taking up moneys beyond the seas upon his master's account, and drawing a bill upon him. He is liable, though he refuse to accept; because, adds the writer, it is understood that the money is obtained on his credit, unless he have made public declaration, denouncing his servant to the brokers of exchanges and otherwise.—Henry Norton was the factotum of the firm. A more comprehensive general agency can hardly be conceived.—But it is said he could not delegate the power to accept. This is not denied, nor did he do so. The bills came for acceptance; and having as agent made up his mind that they should be accepted, he directed Cochrane, the book-keeper, to do the mechanical part—write the acceptance across the bills. He was the mere amanuensis. Had anything like the trust which is in its nature personal to an agent, a discretion, for instance, to accept what bills he pleased, been confided to Cochrane, his act would have been void. But to question it here, would be to deny that the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask. The books go on the question whether the delegation be of a discretion, &c. &c." *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; ante, 175, n. (a).

So, where the question, was, whether notice to the travelling agent of an insurance company, of a fact which would have affected the insurance had it been known to the company, was sufficient notice to the company, it was held in an action by the insured to recover for a loss on a policy of insurance against fire, that such notice was sufficient. Bronson, J. "The general doctrine that notice to the agent is notice to the principal is undeniable. But it is said that W. was a special agent, and that his authority did not extend to receiving notice of a prior insurance. He was not retained for a

single transaction, but was employed to solicit risks, and negotiate contracts for the company, with any body and every body who might wish to insure; and as to that particular business he was a general agent. Third persons dealing with him had a right to judge of the extent of his authority from the nature and course of the business in which he was employed, without being affected by any special instructions, or other limitation of his authority, which did not come to their knowledge. His appointment was not necessarily in writing, and it does not appear that the power under which he acted was communicated to the plaintiffs. But I shall lay no stress upon that fact, and will consider the case on the assumption that the written appointment of W. was laid before the plaintiffs, at the time the business was transacted.—To understand the extent of the agent's power, it will be proper to take some notice of the nature and course of the business in which he was engaged. These companies, for the purpose of extending their business, send out agents to solicit risks, and negotiate contracts of insurances. The agent is furnished with the form of the contract which the company proposes to make, and the conditions on which it is willing to assume the hazard. He is also furnished with a blank for a written application to be filled up and subscribed by any one who may wish to insure. When such a person is found, the papers are laid before him by the agent, a survey is made, the amount of premium is settled, the blank application is filled up and signed, a premium note is made, and five per centum or some other portion of the premium is paid down. The agent receives the application, note and money, and transmits them to his principals. The company thereupon, makes out a policy bearing even date with the note and application, and sends it, either directly or through the agent, to the person insured. The agent is appointed and sent out for the purpose of inviting men to insure, and encouraging them to do so, by transacting the business in such a way as to save them from the necessity of either going or sending to the office of the company. As to every thing else which is required of the applicant, he may confessedly deal with the agent, and I think he may do so, in giving notice of a prior insurance. Indeed, it seems to be necessary that the notice should be given to the agent, to prevent its reaching the company too late. It must be given before the contract is completed, or else the policy is declared void. The policy is dated and takes effect from the time the business was transacted with the agent, and if notice is not given to him, it may often happen that the company will not receive it until after the date of the contract.—I think the company must have intended that notice of a prior insurance should be given to the agent. But it is not necessary to maintain that position. They commissioned W. to negotiate contracts for them, and notice to him while he was engaged in that business, and acting within the scope of his authority was notice to his principals." *McEwen v. The Montgomery County Mutual Ins. Co.* 5 Hill, 101; post 266. "The authority of the agent being limited to a particular business does not make it special; it may be as general, in regard to that, as if the range of it was unlimited." *Nelson, C. J. Anderson v. Coonley*, 21 Wend. 280. But the authority of a general agent is not unlimited. It

must necessarily be restrained to the transactions and concerns appurtenant to the business of the principal. *Odiorne v. Maxcy*, 13 Mass. Rep. 181. See further *Jacques v. Todd*, 3 Wend. 83.||

‡ The same principle has been applied, as it naturally would be, to partners. Partners may, and frequently do by their articles of partnership, impose restrictions on the course of dealing; and as between themselves, whoever infringes these regulations will be liable to his copartners. But the world knows nothing of these private stipulations, and therefore the contract of any individual partner in the name of the firm will bind the rest, however contrary it may be to their own regulations, provided it be within the ordinary course of business of that firm. And the doctrine has been carried even further: for a guarantee given in the partnership name by one partner, without the knowledge of the other, was held binding on his copartner, *though contrary to their own course of dealing*, as well as to their private arrangement with each other. "It is true," says Mr. Justice Bayley, who had in the first instance entertained doubts which were then altogether removed, "that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has *reference to business transacted by the partnership*, although out of the regular course, it is still within the scope of his authority, and will bind the firm." *Sandilands v. Marsh*, 2 B. & Ald. 673.‡ || The close analogy between the law of partnership and of agency has already been alluded to (*ante*, p. 157, n. 2.) and the present seems to be a fitting occasion to introduce an extract from the opinion of a late illustrious judge, containing principles nearly connected with the doctrine stated in the preceding paragraph of the English editor. "No man," says Chief Justice Marshall, "can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others, so far only as he is the agent of the others. If the truth of these propositions be admitted, yet their influence on the case may be questioned. Partnerships for commercial purposes; for trading with the world; for buying and selling from and to a great number of individuals; are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions, as entirely as himself. This is a general power essential to the well conducting of business, which is implied in the existence of a partnership. When then a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and

every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of co-partnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law.—The counsel for the plaintiff in error supposes, that though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret.—Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner, and one whose name was to the articles. But their responsibility in all partnership transactions is admitted to be the same. Those who trade with a firm on the credit of individuals whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles.” *Winship v. The Bank of the United States*, 5 Peters, 561, 562; on a writ of error to the Circuit Court of the United States for the district of Massachusetts. The case in the court below is reported under the title of *United States Bank v. Binney*, 5 Mason, 176.

An extract from the work of another distinguished American jurist, is apposite to this place. “All partnerships are more or less limited. There is none that embraces at the same time every branch of business: and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. The conclusion is otherwise, if the subject matter of the contract was consistent with the partnership business; and the defendants in that case

would be bound to show that the contract was out of the regular course of the partnership dealings. When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one exhibited, one of the partners cannot make a valid partnership engagement, except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstance of partnership, to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals; and when a person takes a partnership engagement, without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority, or its regular course of dealing, he is, in judgment of law, guilty of a fraud. It is a well established doctrine, that one partner cannot rightfully apply the partnership funds to discharge his own pre-existing debts, without the express or implied assent of the other partners. This is the case even if the creditor had no knowledge at the time of the fact, of the fund being partnership property. The authority of each partner to dispose of the partnership funds, strictly and rightfully, extends only to the partnership business, though in the case of *bona fide* purchasers, without notice, for a valuable consideration, the partnership may, in certain cases, be bound by the act of one partner. But if the negotiable paper of a firm be given by one partner on his private account, and that paper, issued within the general scope of the authority of the firm, passes into the hands of a *bona fide* holder, who has no notice, either actually or constructively, of the consideration of the instrument; or if one partner should purchase, on his private account, an article in which the firm dealt, or which had an immediate connection with the business of the firm, a different rule applies, and one which requires the knowledge of its being a private, and not a partnership transaction, to be brought home to the claimant." 3 Kent's Comm. 42, et seq. So, in a case referred to supra, (*United States Bank v. Binney*, which as we have seen was affirmed in error,) Story, J. says: "In respect to both general and limited partnerships, the same general principle applies, that each partner has authority to bind the firm as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the firm, it will *prima facie*, bind the firm, unless it is *ultra* the business of the firm. Where the firm imports, on its face, a company, as A. B. & Co., or A. B. & C., there the contracts made by the partners in that name, bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough. The plaintiffs

must go farther, and show, that it is a partnership signature. In the present case, the signature of 'John Winship,' may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof then, is upon the plaintiffs to establish, that it is a contract of the firm, and ought to bind them." So, "Where a third person lends money to one of the co-partners upon the check or notes of the firm, he has a right to presume it is for the use of the firm ; unless there is something to create a suspicion that the money is not borrowed for the firm, and that the borrower is committing a fraud upon his co-partners. And where money is thus borrowed upon the note or check of the firm, the members of the firm, or those of them to whom the credit was given by the lender, are bound to show, not only that the money was not applied to their use, but also that the lender had reason to believe it was not intended to be so applied at the time it was lent." Walworth, Ch. *Miller v. Manice*, 6 Hill, 119. A third person dealing with a partnership, is not to be affected by any secret arrangements between the members of the firm. *Tradesmen's Bank v. Astor*, 11 Wend. 188.

Where a copartnership is entered into for a particular business, and is limited, and one partner gives the notes of the firm, for a debt arising out of his own private concerns, the other partner is not liable, when the notes are issued without his knowledge or consent, and the person receiving them knows that they are not for a copartnership debt. *Lansing v. Gaine*, 2 Johns. Rep. 301. And a partner is not liable to the payment of a note endorsed by his copartner in the name of the firm, out of the course of the partnership concerns, although he be present, and hear the arrangement respecting the endorsement. Savage, C. J. "Had the transaction related to a partnership concern, both would have been bound ; but this did not, and no man can be bound by implication ; it must be by his express agreement." *Meroein v. Andrus*, 10 Wend. 461. This case seems to point at a distinction between the loss of a right, by not asserting it at the time when other persons are dealing in reference to the subject to which the right is attached ; and the assumption of a liability, by not protesting against the act from which such liability is sought to be induced.—The implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm ; and therefore a person advancing money to one partner, knowing that it was for the latter purpose, cannot, as a matter of course, charge the other partners with the loan, unless the transaction took place with their express or actual authority. *Fisher v. Taylor*, 2 Hare, 218. And see *Livingston v. Roosevelt*, 4 Johns. Rep. 251 ; *Post v. Kimber*, 9 Johns. Rep. 492 ; *North River Bank v. Aymar*, 3 Hill, 269 ; *Early v. Reed*, 6 Hill, 12 ; Story on Part. § 102, 103, 127 ; ante, 157, n. (i) ; *Lawrence v. Taylor*, 5 Hill, 107.¶

kind empowers the agent to bind his employer by all acts within the scope of *his employment, and [*201] that power cannot be limited by any private order or direction *not known to the party dealing with the agent.*(n) And this seems to be founded not so much

(n) Post, ¶ 203, 210, 243 ; ante, 26, 197, n. (h). “ With respect to the extent of an agent’s power, there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts, provided they are within the general scope of an agent’s authority, although they may be contrary to his particular instructions. For I am bound by the contracts which my agent makes in my name, if they do not exceed the power with which he was ostensibly invested, and it will not avail me to show that I have given him secret instructions to the contrary, which he has not pursued. The communications, therefore, from the principal to his general agent, in respect to the time of sale, the price, the terms &c. are not to be taken as limitations of the general power, however wise they may be as suggestions on the part of the principal ; and however it may be the agent’s duty to obey them. This rule has been adopted in favor of commerce and to prevent frauds. But an agent constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority.” 1 Liv. Pr. & Ag. 107, 108 ; post, 202, note. That as a general rule, a third party dealing with a general agent will not be affected by his private instructions, see further *Gibson v. Colt*, 7 Johns. Rep. 394 ; *Munn v. The President &c. of the Commission Co.*, 15 Johns. Rep. 44 ; *The Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 361 ; *Lightbody v. The North American Ins. Co.*, 23 Wend. 22 ; *Lobdell v. Baker*, 1 Metc. 202 ; *Fisher v. Campbell*, 9 Porter’s (Alabama) Rep. 210 ; *Arthur v. The Schooner Cassius*, 2 Story’s Rep. 94 ; *Smethurst v. Taylor*, 12 Mees. & Wels. 545. It is a very trite point in equity, that if the person dealing with the agent knew, or had reason to suppose, that his powers were limited, or at least had such notice as to put him upon inquiry, he must run the risk of the principal’s disavowing the act of his agent. *Stainer v. Tysen*, 3 Hill, 279 ; *Banorgie v. Hovey*, 5 Mass. Rep. 26, 27. And this principle more particularly applies where the agent is acting under a written authority, as a letter of attorney ; in which case, it seems to be the duty of a person contracting even with a general agent, to inspect his authority and ascertain the limitations by which it is restricted. *Sandford v. Handy*, 23 Wend. 260 ; *North River Bank v. Aymar*, 3 Hill, 262 ; *Stainer v. Tysen*, id. 279, 281.¶ In the case of *Petties v. Soame*, Goldsb. 138, it is reported as follows : “ If one be factor for a merchant, to buy one kind of stuff, as tin, and the said factor hath not used to buy any other kind of wares, but this

upon the presumption of an authority given, as upon the principle that where one of two innocent persons must suffer by the fraud of a third, he who enabled that person, by giving him credit, to commit the fraud, ought to be the sufferer.^(o) But a *special* agent, who is employed [202] about one specific act, or certain *specific acts only, does not bind his employer, unless his authority be strictly pursued ; for it is the business of the party dealing with him to examine his authority ; and therefore if there be any qualification or express restriction annexed to the commission, it must be observed, otherwise the principal is discharged.^(A) This principle is particularly exemplified

kind only for his master ; now if the said factor buy silks or any other commodities for his master, and assumes to pay money for that, the master shall be charged in an *assumpsit* for the money, and for that let the master take heed what factor he makes." ¶ This case seems to carry the doctrine of implied authority to an extreme length. It is however cited without disapprobation by Mr. Russell, who after referring to this, and some other decisions says ; " These decisions, moreover, and especially that of *Petties v. Soame*, seem to lead to the conclusion, that a factor's power to bind his principal in any particular case, is not to be measured merely by the mode in which that principal has previously employed him, but that it depends entirely on the circumstances of his being a factor. In that capacity he is supposed to possess a general power to buy and sell ; and this power carries along with it certain incidents recognized by law, the existence of which all persons who deal with him in his capacity of factor are, unless they have notice to the contrary, at liberty to assume, and by the exercise of which his principal will be bound ; and if this be so, then it follows as a general rule, that a known factor has power to bind his principal by all contracts made by him in the way of his business as a factor, whether he has ever before been employed by the same principal in that capacity or not ; and that such power cannot be limited by any order or direction with which the party dealing with the factor is not acquainted. Hence the necessity for the caution given in an old case on this subject :—' and for that, let the master take heed what factor he makes.' " Russ. Fact. & Brok. 78, 79 ; see also *id.* 83, 84.¶

(o) 3 Salk. 233 ; 1 Ld. Raym. 225. (15 East, 400.) ¶ *Lobdell v. Baker*, 1 Metc. 203 ; *Putnam v. Sullivan*, 4 Mass. Rep. 54, 55 ; *North River Bank v. Aymar*, 3 Hill, 268 ; post, 213, n. (d.)¶

(A) Ante, 178, n. (h) 195. *Skinner v. Dayton*, 5 Johns. Ch. Rep. 365 ; *Batty v. Carswell*, 2 Johns. Rep. 48 ; *Nixon v. Hyserott*, 5 Johns. Rep. 57 ; *Munn v. The President &c. of the Commission Co.*, 15 Johns. Rep.

in the case of *Fenn v. Harrison*, where the defendants, being possessed by endorsement of a bill of exchange, employed

44; *Beale v. Allen*, 18 Johns Rep. 363; *Andrews v. Kneeland*, 6 Cowen, 354; *Rossiter v. Rossiter*, 8 Wend. 494; *Tradesman's Bank v. Astor*, 11 Wend. 87; *Stainer v. Tysen*, 3 Hill, 279, 281; *Allen v. Ogden*, 1 Wash. C. C. Rep. 174; *Williams v. Birbeck*, 1 Hoff. Ch. Rep. 360, 368; *Snow v. Perry*, 9 Pick. 542; *Lobdell v. Baker*, 1 Metc. 201; *Thompson v. Stewart*, 3 Conn. Rep. 183; *Kerns v. Piper*, 4 Watts' (Pennsylvania) Rep. 222; *Fisher v. Campbell*, 9 Porter's (Alabama) Rep. 216. So, a purchaser of lands from an incorporated company, is chargeable with notice of all the restrictions upon its power to hold and convey lands contained in its charter. *Merritt v. Lambert*, 1 Hoff. Ch. Rep. 166; and see *Attorney General v. Life & Fire Ins. Co.*, 9 Paige, 477; post, 229, n. 6. But even a special agent, unless particularly restricted as to the *modus operandi*, may employ the ordinary and proper means for effecting the object of his agency. Post, 209; *Trueman v. Loder*, 11 Ad. & Ell. 589; *Andrews v. Kneeland*, 6 Cowen, 354; *Jeffrey v. Bigelow*, 13 Wend. 520, 522; *Anderson v. Coonley*, 21 Wend. 279; *Sandford v. Handy*, 23 Wend. 260. And it is clear, that in the case of a special agent, notwithstanding any restrictions on his powers, "if the principal has by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent, than were in fact given, he could not be permitted to avail himself of the imposition." Marshall, C. J. *Schimmelpennich v. Bayard*, 1 Peters, 290; *Perkins v. The Washington Ins. Co.*, 4 Cowen, 645. "The principle," says Mr. Ch. Kent, 2 Comm. 621, n. c. "that pervades the distinction on this subject rests on sound and elevated morality. There must be no deception anywhere. The principal is bound by the acts of his agent, if he clothe him with powers calculated to induce innocent third persons, to believe the agent had due authority to act in the given case. On the other hand, if there be no authority, nor the show or color of authority from the principal to do an act beyond his powers, the party who deals with an agent in any such transaction, must look to the agent only."

Where the course of business between a merchant in the country and a merchant in town is such, that the country merchant transmits to his correspondent in town his produce and such other articles as he has to sell, and the merchant in town, in return, supplies him with such articles of merchandize as he deals in, and fills up his orders by procuring from other merchants on credit, such articles as he does not deal in, and charges them to the merchant in the country, the latter is not liable to the seller for any articles thus procured, although he directs the purchase of an article which he knows the merchant in town does not deal in and the seller is informed for whom the purchase is made, if the merchant in the country has funds in the hands of the merchant in the city, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognized

F. Huet to get it discounted, telling him to carry it to market and get cash for it, but that they would not endorse it. *F. H.* applied to another person, telling him that though the defendants would not endorse it, yet as their number was upon the bill, that was the same as an endorsement, and that he (*F. Huet*) would indemnify him if he endorsed it. This person accordingly, by putting his own endorsement upon the bill, got it discounted. On the failure of the drawer and acceptor, the holders discovering that the bill had passed through the defendants' hands, applied to them for payment, who at first refused, but afterwards promised to take it up. Upon this promise the action was brought; and the question was, if there were [whether there was] any consideration for the promise, which depended upon whether *F. H.* had power to warrant the goodness of the bill. The plaintiff had a verdict; but upon a motion for a new trial, upon the ground [*203] that this *was *nudum pactum*, the Court(*p*) set aside the verdict, and in stating their reasons said,

such act. The agency in such case is special, without authority to pledge the credit of the principal. *Jaques v. Todd*, 3 Wend. 83.

Where from the nature of the appointment of the agent, it is evident that he must be acting under an authority derived from a person who possessed merely a restricted authority; as, in the case of an agent of executors, or other persons acting *en autre droit*; the party dealing with him is bound to examine his authority. Thus, where a testatrix appointed certain persons resident in Baltimore, her executrixes, and the subject upon which her will was to operate was situate in Louisiana, and the executrixes appointed an agent to act for them in Louisiana, in regard to the disposition of the property there, who made a sale of some portion thereof not consistent with the laws of that state, whereby the sale became invalid, and the purchaser brought an action to recover back the purchase money which he had paid; Story, J. delivering the opinion of the court said; "This is not the case of a general agency, but of a special agency, contracted by persons acting *en autre droit*. The purchaser was, therefore, bound to see whether the agent acted within the scope of his powers; and at all events he was bound to know, that the agent could not, in virtue of any general power, do any act which was not in conformity with the laws of Louisiana." *Owings v. Hull*, 9 Peters, 608, 628.||

(*p*) Diss. Ld. Kenyon.

if *F. H.* had been the *general* agent of the defendants, it would be admitted that they would be liable for his acts ; but it appears from the evidence that he was constituted their *particular* agent with a *circumscribed* authority. And that brings it to the case put of the sale of a horse, in which the distinction is, that if a person keeping livery stables, entrust *his servant* with a horse to sell, and direct him *not* to warrant, and the servant did nevertheless warrant him, still the master will be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed cognizant of any private conversation between the master and the servant ; but if the owner of a horse send a *stranger* to a fair *with express directions not to warrant the horse*,^(q) and the latter act contrary to the orders, the purchaser can only have recourse to the person who actually sold the horse, and the owner is not liable on the warranty. That is a similar case to the present ; for *F. Huet*, who was employed to get the bill discounted, was expressly directed by them not to endorse it. There is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a *merchant residing abroad, the principal is [*204] bound by his acts.^(r) But an agent constituted so for a particular purpose, and with a limited and circumscribed authority, cannot bind the principal by any act in which he exceeds his authority ; for that would be to say that one man may bind another against his consent.^(s)

A comparison also of the following cases will tend to place this principle in a clearer point of view. A merchant sent his servant, *who had used to transact affairs of that nature for him*, with a note drawn upon S. E. with orders to get ‡ from him‡ either bank bills or money, and turn them into exchequer bills ; the servant instead of

(q) See post, §210.]]

(r) See note (o) page 171.

(s) *Fenn v. Harrison*, 3 T. R. 757 ; and 4 T. R. 177 ; post, §208.]]

doing so, got B. to give him a bank bill for it, with which he bought exchequer bills and carried them to his master; and before the bill upon S. E. was paid, S. E. broke. The question was whether the loss should fall upon B. or upon the merchant. At the trial, Parker, C. J., was first of opinion that it should fall upon B. because the servant acted directly contrary to his master's orders, and B., by furnishing the servant with a bank bill, did the master no service at all, for if he had not, the servant must have gone and received the money himself from S. E.; and he referred to the case [*205] of *Ward v. Evans*,^(t) in which he said it had *been decided that a servant sent to receive money could not bind his master by receiving a bill; but upon the suggestion of one of the jury, that whether a servant *who was used to act* upon the credit of his master, went against his orders in a particular instance, was a fact that could not be known to a third person, he altered his opinion, and a verdict was given against the master, which was afterwards attempted to be set aside. But the court were all of opinion that it was right, and that the master was chargeable; for a servant by *transacting affairs for his master* does thereby derive a general authority and *credit* from him; and if this general authority should be liable to be determined for a time by any particular instructions or orders, there would be an end of all dealing but with the master.^(u) It is observable, that in this case the fact of a *general* authority is expressly insisted on, which distinguishes it from that of *Ward v. Evans*, cited by the Chief Justice, which was this: *Ward* sent his servant to receive 50*l.* from B.; the latter desired *Sir Stephen Evans* who owed him a sum of money, to strike off 50*l.* from his debt, and pay *Ward's* servant. *Sir S. Evans* accordingly credited himself with 50*l.* in B.'s account, but instead of giving *Ward's* ser- [*206] vant money, gave him another person's note *which the servant took for payment. The note not being

(t) Post, || 205, 291.¶

(u) *Nickson v. Brohan*, 10 Mod. 109; see also *Thorold v. Smith*, 11 Mod. 8.

paid, *Ward* brought an action against *Evans* for money received to his use. It was insisted that the defendant was discharged by the servant's taking the note in payment; but the court, (who also resolved that the action for money had and received was proper)(10) were of opinion that the act of the servant in receiving a note instead of money did not bind the master under these circumstances.(v) This it is to be remarked, appears to have been the case of a servant employed in that particular instance only.

‡ The same distinction was applied to the following case. A gentleman drew a check on his banker in favor of a creditor, and delivered it to his *farm bailiff* (who was in the habit of buying and selling cattle for him,) to be given to the creditor. The bailiff, however, at the request of the creditor, discounted it with another bank and paid him the proceeds. Five days afterwards the bank, on which the check was drawn, failed, and the bankers who had discounted it, having failed to present it, sought to recover the amount from the drawer. The jury found a verdict for the plaintiff, upon which a new trial was obtained in the Court of Exchequer. There were other points in the case to which it is unnecessary to *advert: on [*207] the point now under consideration, Alexander, C. B., in delivering the judgment of the Court, said—"It appears to me to be a very dangerous doctrine, to establish that a person filling a capacity like that of the defendant's farming bailiff should, without a specific authority for that purpose, have power to bind his master, and with such an impression on my mind I cannot subscribe to the opinion of the learned judge who tried the cause. On the contrary, I think the particular circumstances of the case negative any such authority."‡(11)

3. A general power to buy or sell binds the person giv-

(10) ‡ In which, however, the court was wrong.‡

(v) *Ward v. Evans*, 2 Ld. Raym. 930 ; Salk. 542.

(11) ‡ *Waters v. Brogden*, 1 Y. & J. 457.‡

ing it as to all others dealing *bona fide*, however disadvantageous the terms of the contract may be.

A factor is one who has a general power to buy and sell according to the best of his judgment, and therefore all bargains which third persons make with him without fraud or collusion may be enforced against his principal ; and if he sell for a less price than his commission directs, his sale is nevertheless valid.(w) And there is a case in which it was held, that where a general factor resident abroad, and usually employed in the purchase of silk, bought a commodity of a different kind, the principal was chargeable.(x)

[*208] † And *the like general power may be presumed and to the same extent in the case of a broker, if the principal has allowed him to have the apparent control and disposition of the goods.‡

But a special authority must be strictly pursued.(y) Therefore where a particular authority was given to sell by auction at not less than a certain sum, and the agent sold by private contract, though without fraud, and the sum obtained was more than the price fixed, a specific performance was refused in a Court of Equity.(z) So if a person specially authorized to bid a certain price for another, should offer more than he was empowered to do, he would be liable himself, and not his employer.(a) An auctioneer may † indeed in all cases‡ be considered as a special agent for the purpose of sale, and as soon as the sale is complete, his agency ends ; he has no authority therefore to bind his

(w) Ambl. 498. || The above is a necessary deduction from the principle, stated ante, 200, 201. And he may buy and sell in his own name, which, in general, a broker cannot do. *Trueman v. Loder*, 11 Ad. & Ell. 689 ; ante, 13, n. (A).||

(x) *Petties v. Soame*, 13 Vin. Ab. 6 ; || ante, 201, n. (n).||

(y) Ante, p. 199, n. (9).

(z) *Daniell v. Adams*, Ambl. 498 ; † and see *Clinan v. Cooke*, 1 Sch. & Lef. 22 ;‡ || ante p. 3, n. (a).||

(a) Ib. per Sir T. Sewell, Master of the Rolls.

employer by treating of the terms upon which a title is to be made.(b)

Thus also if a broker be employed to make one particular purchase of goods of a certain description and price, the principal will not be bound by his contract if the broker depart from his instructions in either of those particulars ; but in "the case of a factor or general broker, it would be otherwise.(c) [*209]

4. But inasmuch as a power to do any act comprises a power to do all such subordinate acts as are usually incident to or are necessary to effectuate the principal act in the best and most convenient manner,(d) it is necessary even in regard to a special agent, if it be intended to exclude from his authority any circumstance which would otherwise fall within it, that it should be done by express directions.(A) Thus, though it has been decided that a special agent, employed to negotiate a bill of exchange, and

(b) *Seton v. Slade*, 7 Ves. 276 ; || post, 314, n. (2).||

(c) *East India Company v. Henley*, 1 Esp. Cas. 111 ; || ante, 201, n. (n).||

(d) Ante, p. 189, &c. ; 1 Campb. 43 b.

(A) || Ante, p. 197, n. (h), p. 202, n. (A) ; 2 Kent's Comm. 621, n. (d) ; *Andrews v. Kneeland*, 6 Cow. 354 ; *Sandford v. Handy*, 23 Wend. 260. Cases may arise, *ultimæ necessitatis*, in which it would be proper for an agent, however restricted the terms of his authority may be, to exceed his expressed authority, or to assume a new authority, for the purpose of rendering available to the principal, the subject matter in regard to which, he became the agent, and more especially for the preservation of the property of his principal. Story on Bailm. § 455 ; *Forrestier v. Bordman*, 1 Story's Rep. 43 ; ante p. 17. " While it is the duty of all masters and supercargoes faithfully to obey their instructions, yet, from their very nature, when given in relation to a foreign voyage, to be prosecuted at different ports and in distant countries, amidst fluctuating markets and changing seasons, such orders are to receive a liberal construction, and the master is to be justified when acting honestly within the scope and spirit of them, although he may seem to violate the letter. Such discretion as a liberal construction allows, is a necessary ingredient in the authority conferred, and is required by the interests of commerce." Hubbard, J. *Gould v. Rich*, 7 Metc. 556. As to agent by necessity, see further ; *Chapman v. Morton*, 11 Mees. & Wels. 535 ; *Sands v. Taylor*, 5 Johns. Rep. 395 ; ante, p. 3, n. (a).||

expressly directed not to endorse it for his principals, could not bind them by doing so ;(e) yet when the fact appeared to be that the agent was merely commissioned by the defendants to get the bill negotiated, and no express directions given him not to endorse it, it was resolved that the defendants, having commissioned the agent to get the bill discounted, without restraining his authority as to the mode of doing it, were bound by his acts ; and therefore that he having warranted the bill to be a good one, this constituted a good consideration for their subsequent promise [*210] to pay it.(f) In *the case also already put of a warranty of a horse made by an agent, where it is stated(g) that a special agent cannot bind his employer by a warranty, it is with this qualification, that *he is expressly directed not to warrant*.(h) for otherwise, if a master entrust his servant to sell a horse, and give no directions respecting the warranty, he is bound by the warranty of the servant(i) upon the principle before mentioned, that every thing is supposed to be comprehended in an authority, which is necessary to effectuate the object in the best manner. Thus in an action for a breach of contract in refusing to receive goods bargained for at a certain price, the defence was, that the contract was made by a special agent who was limited as to the price, which he had exceeded. Upon the examination of the agent himself, it appeared that though his instructions were to buy at a specified price, yet that he understood himself to have a discretionary power of exceeding that price if necessary. Upon this testimony it was ruled that though a special agent (which this was admitted to be) acting under a limited authority could not in general bind his principal, if he exceeded that

(e) *Fenn v. Harrison*, 3 T. R. 757 ; ante, ||202.||

(f) *Fenn v. Harrison*, 4 T. R. 177.

(g) Ante, p. 203.

(h) Ib.

(i) *Helyear v. Hawke*, 5 Esp. 75, per Lord Ellenborough ; and see *Runquist v. Ditchell*, 3 Esp. 65 ; *Alexander v. Gibson*, 2 Campb. 555.

authority, yet that the *limitation must be express [*211] and positive, and not subject to the agent's discretion.(k)

Other instances referrible to this principle will be met with in the sequel.(l)

Whether an agent has a general or only a special authority is properly matter of evidence for the consideration of a jury.(m) And it is almost superfluous to observe, that repeated instances of similar acts acquiesced in by the employer, is evidence of an authority for the act in question.(n)

5. Where the authority given has been exceeded, subsequent assent of the principal has the same effect, as it has already been observed to have in cases where no previous authority has been given.(o)

SECTION 6.

The Power of Factors, or other Agents, in the Disposition of Goods, and herein of the Factor's Act.

In the contract of sale by an agent, as in all other acts done by him, it is essentially requisite, in order to bind the principal, that the authority, *either ex- [*212] press or implied, should be pursued. The rules by which the extent and effect of that authority are to be estimated have been attempted to be explained in the preceding sections.

(k) *Hicks v. Hankin*, 4 Esp. 116; † and see *Whitehead v. Tuckett*, 15 East, 440.‡ || Ante, 202, n. (A)||

(l) *Abbot*, 92, 93.

(m) Per Holt, C. J. and Powell, J. *Thorold v. Smith*, 11 Mod. 88. † *Dyer v. Pearson*, 3 B. & C. 38.‡

(n) *Ib.* per Powell, J.

(o) Ante, p. 172.

1. In the absence of particular instructions, a general power to sell implies a power to sell in the usual way ;(A) and therefore the right of an agent, under such a general authority, to sell upon *credit*, depends entirely upon the fact of that being the usual mode of dealing in the particular trade in question.(B) If there be no such usage, no contract is created between the principal and vendee, and such sale is a conversion in the factor, and if not in market overt, no property is thereby altered, but trover will lie against the vendee ; so likewise if it be in market overt, and the vendee knows the factor to sell as factor.(a) It is now indisputable, though formerly doubted, that factors may sell upon credit, "because it is the constant and daily practice for them to do so,"(b) And where the practice is

(A) || Although that *usual way* may be unknown to the principal. *Sutton v. Tatham*, 10 Ad. & Ell. 27 ; ante, p. 5, n. (A) ||

(B) || In the case of *The State of Illinois v. Delafield*, 8 Paige, 527 ; S. C. 2 Hill, 159 ; 26 Wend. 192, it was held, that an agent *for a state*, authorized to borrow money on a sale of *stock*, cannot sell on *credit* without express authority, even though by the usages of trade, it be the custom to sell such stocks on a credit, when they are the private property of individuals. It was further held, that if the agent for a state unauthorizedly sell its stock on credit, or below par, to a purchaser chargeable with notice of his want of authority, the state may repudiate the contract, and follow the property in the hands of such purchaser, and before it has been passed away to a *bona fide* holder without notice. 2 Kent's Comm. 622, n. a. Post, 213, n. c. ||

(a) Per Holt, C. J. 12 Mod. 514. || The English law in regard to sales in market overt, does not apply in the State of New York ; there being no such thing with us, as what is technically called a market overt. *Mowrey v. Walsh*, 8 Cowen, 238 ; *Andrew v. Dieterich*, 14 Wend. 31 ; *Hoffman v. Carow*, 20 Wend. 21. ||

(b) Willes, 407 ; *Houghton v. Matthews*, 3 Bos. & Pull. 489 ; || ante, p. 26, 27 ; *Forrestier v. Bordman*, 1 Story's Rep. 43 ; *McKinstry v. Pearsall*, 3 Johns. Rep. 319 ; *Goodenow v. Tyler*, 7 Mass. Rep. 36, 44 ; *State of Illinois v. Delafield*, 8 Paige, 527. An admission by an agent in his answer to a bill in equity filed by his principal, that he has sold property of his principal upon credit, will not entitle the latter to an inquiry as to wilful default, if the agent insist by his answer, that the credit was given in the usual way of business, and the plaintiff make out no case to the contrary. *Pelham v. Hilder*, 1 Yo. & Coll. C. C. 3. If the factor, in a case duly

otherwise, the agent's power is limited accordingly. Thus on the transfer of *stock*, which is usually sold for ready

authorized, sells on credit, and takes a negotiable note payable to himself, the note is taken in trust for his principal and subject to his order, and if the purchaser should become insolvent before the day of payment, the circumstance of the factor having taken the note in his own name, will not render him personally responsible to his principal. 2 Kent's Comm. 623 ; *Goodenow v. Tyler*, 7 Mass. Rep. 36 ; *Messier v. Amery*, 1 Yeates' (Pennsylvania) Rep. 540 ; *Muller v. Bohlens*, 2 Wash. C. C. Rep. 378. Whether an agent, taking in his own name, a bond from the purchaser for the debt, makes himself personally liable, see *Jackson v. Baker*, 1 Wash. C. C. Rep. 394, 445 ; cited ante, p. 48, n. 2. On the other hand, if a factor, at the expiration of the credit given on a sale, takes a note payable to himself at a future day, he makes the debt his own. *Hosmer v. Beebe*, 14 Martin's (Louisiana) Rep. 368. But may not a factor, very properly, in case of the supervening insolvency of the purchaser, enlarge the period of credit, by taking such additional security as would assure the ultimate payment of the debt?—ante, 209, n. (A).

The sale of several parcels of goods by a factor, belonging to several of his principals respectively on a credit, to one person, and taking one note from the vendee for the whole payable to himself, will not, *per se*, render him liable to his principals: nor will the factor's giving up the note, and taking others, payable earlier, or at the same time with the first, render him liable, provided he still retain the name of the vendee, either as maker or endorser. "If," says the judge who delivered the opinion of the court in this case, "the factor had omitted to take any note, he would not, for that omission, be responsible. The sale in that case would have been charged in his books; the principal might sustain an action on it in his own name, or give information to the purchaser, and forbid payment to the factor. All these rights remained after the note was given. It is well settled, that giving a promissory note for goods sold, is not a payment or extinguishment of the demand, unless such was the agreement of the parties. The defendant then had, notwithstanding the note, a remedy against K. [one of the purchasers] by action. Why should the taking of a note which the factor might justifiably have omitted, be considered an act absolutely charging the factor? All the remedy the principal had a right to claim still remained. If it had appeared that the principal had demanded the note taken for his goods, and the factor had refused to assign it, or to allow the principal the benefit of it, that would present a different question. Then, indeed, the imprudence of having taken but one note for several demands would be manifest, inasmuch as the factor thus put it out of his power to assign to each of his principals. By pursuing such a course he incurred the risk of not being able to perform what his principal had a right to demand. Although not required to take a note in the first instance,

money only, it was lately held that a sale for a bill at fourteen days could not be enforced ; the transaction being conducted by a stock-broker to whom a general authority was given to sell. Upon that occasion Lord [*213] *Ellenborough said, when the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of stock, which he agrees to sell? The broker here sold the stock in an *unusual* manner ; and unless he was expressly authorized to do so, his principal is not bound by his acts.(c)

yet having taken it, the principal would be entitled to the security, so as to enable him to pursue the course deemed advisable. But that case never occurred, &c." *Corlies v. Cumming*, 6 Cowen, 181.¶

(c) *Wiltshire v. Sims*, 1 Campb. 258.

¶ This was a motion for an injunction. The State of Illinois filed a bill in the Court of Chancery of the State of New York, for the purpose, *inter alia*, of restraining the defendant from selling, hypothecating or parting with certain bonds or certificates of public stocks of the State of Illinois, or the proceeds thereof. The bonds for \$300,000, of the stock, were signed by the Governor and Auditor of the state, and countersigned by the Treasurer, as directed by the act of January 9, 1836, for the construction of the Illinois and Michigan canal : and the bonds for \$283,000, the residue of the stock, were signed by the fund commissioners, and duly countersigned by the auditor, as authorized by the act of February, 1837, to establish and maintain a general system of internal improvements. The first parcel was received by the defendant, under an agreement made by the agents of the Governor, who was authorized by law to appoint agents to borrow money upon such stocks for the making of the canal ; under an express prohibition, however, contained in the statute, that the stock should not be sold for less than its par value. And the last parcel was received by the defendant under an agreement made with the Fund Commissioners, who were also authorized to make loans of money for the internal improvement of the state, and to issue such bonds for the money loaned thereon ; but under a similar restriction, that the stock or bonds should not be sold for less than their par value. The bonds in both cases were sold to the defendant on a credit ; the money to be paid to the state in periodical payments, without interest, although the bonds were to be delivered to the defendant in advance, and were to bear interest immediately.

2. A power to sell, such as is possessed by a factor or broker appointed for that purpose, can only be executed by

The defendant had paid to the agents of the state about \$170,000 towards the bonds, but made default in meeting the other instalments as they became due, leaving more than \$400,000 of the stipulated price of the bonds delivered, still due and unpaid according to the contracts. The motion for an injunction was argued upon the foot of the bill merely, and before answer, and an injunction was granted according to the prayer of the bill. Walworth, Ch. "There are no controverted facts in this case which have any bearing upon the questions to be decided on this application. The state bonds or certificates of public stocks, which are the basis of this controversy, purport to have been issued in accordance with the statutes of Illinois, authorizing the Governor in the one case, and the Fund Commissioners in the other, to issue such securities. If these securities, therefore, pass into the hands of *bona fide* holders, who have no notice of any irregularity, or want of authority on the part of the officers or agents of the state who put them in circulation, the complainant, [i. e. the State of Illinois,] is both legally and equitably bound to pay them to such holders. The state cannot indeed be sued [in consequence of the unfortunate article 11, of the amendments to the constitution of the United States,] by any private individual or corporation. It therefore may be impossible to coerce a payment by any legal process, unless the stock should come into the possession of a sovereign state; [what does the learned Chancellor mean in the last sentence? Although the stock did come into the possession of a sovereign state, it does not follow that there is any right of action against such sovereign state;] or, should get into the hands of a debtor of the State of Illinois, so as to be a proper subject of set-off in a suit against him by the complainant for the debt. But, [and this may be regarded as an aphorism,] *the honor or faith of the state is nevertheless as much pledged for the redemption of these securities which she has permitted her agents to put in circulation, as that of an individual would be under similar circumstances.*" After several remarks, which have no application to the present topic, the Chancellor proceeds to the points now directly concerned with our subject. "I think also the counsel for the complainant are right in supposing that these state officers and agents were not authorized to contract for a sale of these bonds on a credit. As a general rule, an agent for sale, unless he has an express authority to sell on a credit, must sell for cash. An authority to sell on credit is implied, however, where from the general usages of the trade in which the agent is employed, it is the custom to sell on credit. But if the property, which the agent is employed to sell, is of a description which is usually sold for ready money only, he is not authorized to sell it on credit, without an express authority to do so.—Here, we have no evidence as to any general usage in this state [New York,] for the sale and actual delivery of stocks on a credit, by bro-

way of sale, and does not justify a disposition in any other manner. † A factor, therefore, cannot dispose of the goods

kers empowered to sell. But I believe, in fact, that they do not usually sell, and actually deliver stocks, without receiving payment therefor at the time ; unless they are specially authorized by the owners of such stocks to sell on a credit. Even if the usage was otherwise, as to sale of stocks belonging to individuals, that would not authorize the officers or agents of a state, who were empowered to borrow money for its use, to contract to sell and deliver the public securities on credit, without an express authority for that purpose. The two or three recent instances, in which states have had the misfortune to lose large amounts of their stocks, in consequence of the mistakes of their agents, in suffering such stock to go out of their hands before they received the money agreed to be loaned, cannot amount to a general usage to sell state stocks on credit.—Indeed, the very idea of selling these state bonds on a credit, is entirely inconsistent with the spirit of the statutes of Illinois, under which these bonds were to be issued. The state securities, in the hands of its agents, were not an article of merchandize. The object was to borrow money ; not to sell the stock in the ordinary way in which stock held by individuals is sold. The statute does, indeed, authorize the agents of the state to contract for loans payable by instalments, as the money may be wanted for the use of the state. But this provision does not imply that the lenders are to receive the securities of the borrower before the money agreed to be loaned is actually lent. I am not aware that any sane and solvent man ever borrowed money by giving his negotiable securities in advance to the lender, and taking in payment therefor such lender's promises instead of cash ; unless the promises were put in such form as to be convertible immediately into cash, at some rate, and were intended to be sold at a discount to raise money elsewhere. In this case, however, the agents of the state contracted to deliver the securities of their government in advance, and to take a mere agreement, which was not negotiable, to pay the money to the state by instalments, at future times. This was not a borrowing of money, but it was a sale of the state securities on credit, as an article of merchandize, without any authority express or implied, to give such credit. It is said, however, that the State of Illinois has confirmed the acts of the agents who made these sales ; and that it is now too late to rescind the agreements as having been made without authority. But no officer or agent of the state had any power to make or authorize the making of such contracts originally ; and of course none of them had the power to confirm them afterwards. For no person can confirm an unauthorized agreement, made by another, unless he had himself the power to authorize the making of such an agreement. As the sovereign power of the state, by a legislative act, had prohibited any of its officers, or agents, from selling its stocks below their par value, it follows of course, that nothing short of a law of the state, proceeding from the same authori-

in the way of barter :(1) and † it is clearly settled that he has no authority to *pledge* the property entrusted to him.(d)

ty, can legalize such a transaction.—The contract for the delivery of the bonds being wholly unauthorized, and there having been no subsequent ratification by the legislative power of the state of Illinois, or by any officer or agent who had the power to ratify these illegal sales of the stocks, an injunction must be granted as prayed for." *The State of Illinois v. Delafield*, 8 Paige, 527. The decision of the chancellor in this case was affirmed by the Court of Errors of New York, 2 Hill, 159; S. C. 26 Wend. 192.¶

(1) † *Guerreiro v. Peile*, 3 B. & Ald. 616.‡ ¶ And therefore where a factor bartered the goods of his principal, it was held that no property passed; and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only. *Ibid.* A factor on making a sale, cannot arrange with the vendee, for any other than the usual modes of payment; and therefore if he undertake, in order to procure the price to which he is limited by his principal, to allow the vendee, in payment to set off a debt due by the principal to the vendee, he is accountable to his principal for the amount at which the goods were directed to be sold. *Guy v. Oakley*, 13 Johns. Rep. 332; 1 Liv. Pr. & Ag. 129.¶

(d) *Paterson v. Tash*, 2 Str. 1182; *Daubigny v. Duval*, 5 T. R. 604; *De Bouchot v. Goldemid*, 5 Ves. Jun. 211; ¶ *Urquhart v. McIver*, 4 Johns. Rep. 103; *Van Amringe v. Peabody*, 1 Mason, 440; *Kinder v. Shaw*, 2 Mass. Rep. 398; *Odiorne v. Maxcy*, 13 Mass. Rep. 181; *Newbold v. Wright*, 4 Rawle's (Penn.) Rep. 195; *Queiroz v. Trueman*, 3 Barn. & Cress. 342; *Stevens v. Wilson*, 6 Hill, 513; *Leayroyd v. Robinson*, 12 Mees. & Wels. 745; *Rodriguez v. Heffernan*, 5 Johns. Ch. Rep. 429. A court of equity will oblige the pawnee, if he admits the title of the true owner and only claims the value for which the goods were pledged, to make such a discovery, and give such a description of the property, as to enable the owner to bring an action at law for it. *Marsden v. Panhall*, 1 Vern 407; *Strode v. Blackburne*, 3 Ves. Jun. 222. Where a factor has raised money by a wrongful pledge of the goods of his principal, it is competent to the latter, in taking the account between himself and the factor, to abandon the goods, and treat the money raised thereon as money had and received to his own use. *Bonzi v. Stewart*, 4 Mann. & Gran. 295.¶

[The propriety of the doctrine laid down in *Paterson v. Tash*, has been questioned by Lord Ellenborough in succeeding cases, although his Lordship has not professed to overrule it.] ¶ "In 1816, Gibbs, C. J. told Manning [it is presumed one of the reporters alludes to himself,] that this case, was misreported, but that having been acted upon, it could not now be shaken." 4 Mann. & Gran. 307, n. (a).¶ [In the case of *Pickering v. Busk*, 15 East, 44, Lord Ellenborough, alluding to this case, said, "It was a hard

[214*] Nor is it of any *consequence that the pledgee is ignorant of the factor's not being the owner.(e)

doctrine when the pawnee was told that the pledger, of the goods had no authority to pledge them, being a mere factor for sale." And in the more recent case of *Martini v. Coles*, 1 Maule & Selw. 146, his Lordship observed, "*Perhaps it would have been well if it had been originally decided, that where it was equivocal whether a person was authorized to act as principal or factor, a pledge made by such a person, free from any circumstances of fraud, was valid. But,*" continued his Lordship, "*it is idle now to speculate upon this subject, since a long series of cases has decided that a factor cannot pledge.*"'] || Story on Bailm. § 325, 326. "The point" says Mr. Justice Story, (Agency, § 113, n. 5,) "whether a factor has an authority to pledge the goods of his principal has undergone a good deal of discussion, and no small degree of doubt has been entertained upon it, until a recent period. The doctrine is now fully established in England, that he cannot pledge, although some of the judges have lamented the establishment of it. The same doctrine seems now generally established in America.—The English doctrine is apparently founded upon the rule of the civil law; *Nemo plus juris in alium transferre potest, quam ipse possideret.*—Still, it is but a general rule; and therefore not absolutely superseding other considerations, growing out of the character of the parties, and the nature of the particular authority conferred upon the party, who is in possession of the property. The question is not, in many cases, whether the party can transfer that to another, which he does not in reality possess and own; but whether a party, ostensibly clothed with the ownership of property by the real owner, and thus acquiring an apparent authority to dispose of the whole interest; may not dispose of an interest in such property, less than the whole, to another innocent party. If one of two innocent persons must suffer by the wrongful act of a third person, it is certainly most conformable to equity and sound principles, that he should suffer, who has enabled such third person to hold himself out as competent to do the act. [Ante, 201.] The very circumstance that in England the Parliament has interfered [as well as the Legislatures of New York, and of some other states, by statutes which will be referred to in the sequel,] demonstrates the inconveniences of the old rule; and the importance of relaxing it in commercial transactions." See post 221, note (3).||

(e) 5 Ves. Jun. 213; *Newsom v. Thornton*, 6 East, 17; || *Rodriguez v. Heffernan*, 5 Johns. Ch. Rep. 429; 1 Liv. Pr. & Ag. 130. If, however, the owner arms the factor with such *indicia* of property, as to enable him to deal with it as his own, and mislead others, the factor in that case can bind the property by pledging it. *Boyson v. Coles*, 6 Maule & Selw. 14. The principal in order to sustain an action against the pledgee is not even obliged to tender to him the balance due by him, the principal, to the factor. 2 Kent's Comm. 625; *Jarvis v. Rogers*, 15 Mass. Rep. 396; *Daubigny v.*

In trover for a certain quantity of tobacco, the facts were, that the plaintiff, a merchant, employed an accredited broker in the tobacco trade, and who dealt in that article on his own account, to purchase some for him. The broker made the purchase in his own name, and had it transferred to himself in the King's warehouse. While it remained there the broker pledged it to the defendant, who was wholly ignorant of the transaction between him and the principal merchant; but upon his refusing to deliver it up, the latter was held entitled to recover.(f)

[And even in the case of a factor, whose course of dealing justifies the implication of an authority to sell, the sale must be absolute, in order to be binding upon the principal, for if the goods be placed in the hands of third persons, not as buyers but for the purpose of obtaining a buyer, this disposition of the property amounts to a pledge, and *the pawnees have no right to retain it, or the [*215] proceeds of it, from the principal, although they may have made advances to the factor upon it.](3)

Duval, 5 Term. Rep. 604; *Newbold v. Wright*, 4 Rawle's (Penn.) Rep. 195.¶

(f) *McCombie v. Davies*, 6 East, 538.

(3) [*Shipley v. Kymer*, 1 M. & S. 484.] † And substantially the same point was decided in *Solly v. Rathbone*, 2 M. & S. 298, ante, p. 150; and *Cochran v. Irlam*, ib. 301, ante, p. 177; in both of which cases it was held, that the power of the factor was *strictly* a power to sell; and that if the goods were delivered by him to another, whom he had made his substitute, even though not in the way of a pledge, yet that other acquired no lien for advances made or charges incurred in respect of the goods.‡

¶ The mere fact that the principal has drawn bills upon his agent or consignee for the amount of the consignment; does not authorize the latter to pledge the goods in order to meet such bills. The following case, which is not alluded to by our author, or either of his English editors, determines the above position and is besides so apposite to the main topic now under consideration, that no apology seems required for making a copious abstract from it.—The plaintiffs consigned a quantity of hides to Battye & Co., who were brokers, to be dealt with according to their discretion; and soon after the consignment, drew bills of exchange upon them, on account of these hides; such having been the course of dealing between the parties in regard to former consignments. The bills were accepted by Battye & Co.,

The same rule applies to the assignment of a bill of lading by a factor, which cannot be transferred by way of

and would, if their bankruptcy had not afterwards intervened, have been cash in their hands to the amount of the hides. Before the bills became due, Battye & Co. received advances of money from the defendant on the credit of the hides which were delivered into his hands, but the names of the principals were not mentioned. On the trial before Lord Ellenborough a verdict was found for the defendant, with leave to the plaintiffs to move the point; and after argument a new trial was granted. Lord Ellenborough. "The agents of the plaintiffs in this case were brokers in the City of London. It would be very desirable, when persons who sustain the character of brokers assume an ulterior authority, if those with whom they deal would make inquiry whether they were authorized so to deal; it would be the means of avoiding much deception; and the omitting to take this precaution has occasioned a great proportion of the cases litigated at Guildhall. In this case, the largest authority was delegated to Pilgrim and Battye as factors; they were to deal with the goods according to their discretion; it was the largest authority as to sale, to whom the goods should be sold, the time, the quantum of price; no powers could be more extensive. There was a stipulation that they should be permitted to draw as before; and therefore it would not have lain in their mouths to have objected to a sale as being disadvantageous in its terms. When they came to deal with the defendant as if they had a principal behind, or if there was any reason for the defendant's apprehending that there was a principal behind, and that Pilgrim and Battye were acting merely as brokers; it was for him to inquire what authority they had to pledge the goods, as has been decided in a multitude of cases. If such application had been made, it would have appeared that the brokers had no authority to pledge the goods. There was no express authority, nor was there (which is the only question which has created any doubt) any implied authority to pledge; but it is the mere case of goods placed in the hands of a broker for the purposes of sale, with a stipulation to make advances to the principal. There should have been an express stipulation for an authority to pledge. Such an authority might have been demanded and given; but it was not, and therefore the case falls within the decision in *Paterson v. Tash*, and other cases, in which it has been determined, that it is not within the scope of the factor's authority to pledge the goods." Bayley, J. "A person who buys the goods is safe; but if he takes them upon pledge he does it at his peril. The mere circumstance of the plaintiffs' drawing against their consignments, or of their drawing from time to time on former consignments, can give no authority to the factor to pledge the goods. If the principal draws bills which the factor accepts, he may, not by pledging, but by sale for ready money if he choose, raise funds to meet those bills; and if he apprehends that he cannot sell for ready money, or discountable bills, it is his own fault to accept. In this

pledge, so as to exclude the principal's right to stop *in transitu* ; for a bill of lading, which is an authority to receive the goods, cannot give the factor a greater power over them, than the possession of the goods themselves would do.(g)

case, therefore, the factors had no authority to pledge, and the case is not distinguishable from the common cases." Abbott, J. "It has been decided, and is now the settled law, that a factor cannot pledge the goods of his principal ; and it is for the benefit of commerce that this principle should be held sacred and inviolate. The person who entrusts another with the sale of his goods, has no other security for the safety of his property, except the incapacity of the agent to dispose of it otherwise than by sale. But it is said, that although a factor cannot, according to the general rule, pledge the property, yet he may under a special authority for that purpose : and beyond all doubt there may be cases in which the principal clothes his agent with a higher authority ; and a doubt occurred to his Lordship at the trial of this cause, whether such an authority could be implied from the circumstances of this case. Considering all these circumstances, it appears to me, that the discretion to be exercised must be understood as a discretion to be exercised according to the duty of the parties as factors, and that they were to deal with the property according to such discretion as a factor ought to exercise. It appears that the plaintiffs drew on Battye & Pilgrim, and had drawn upon them on former occasions upon the consignment of goods to them for sale ; but this is the common, if not the universal course ; when a manufacturer sends goods into the country for sale, he constantly draws on the strength of his consignments. This is the usual course of dealing ; goods are consigned and bills are drawn ; to allow the factor in such a case to pledge the goods, would operate to the destruction of a principle which the law holds sacred. Holroyd, J. was of the same opinion." *Graham v. Dyster*, 2 Stark. Rep. 21. A request to the factor to make remittances in anticipation of sales, does not give him any special authority to pledge the goods. *Queiroz v. Trueman*, 3 Barn. & Cress. 342.||

(g) *Newsom v. Thornton*, 6 East, 17. || And it is the same thing whether the endorsee of the bill of lading was or was not ignorant that the factor acted as such. Ibid. 2 Kent's Comm. 550. The ground on which in the case of *Newsom v. Thornton*, the power of pledging the bill of lading was claimed for the factor appears to have been this ;—"that the owner of goods who placed them in the hands of a factor for sale, had no means of marking the goods themselves in such manner as to show in what capacity the factor held them, and that the law must therefore protect him, in case the factor should exceed his authority by pledging such goods. But with respect to a bill of lading the case, it was argued was different ; inasmuch as the owner had the means, by an endorsement on the instrument itself, of informing every person into whose hands that instrument might come, that

[In that case the transfer of the bill of lading was originally *tortious*, because it was *deposited as a security* for advances made by the endorsees : but the same rule applies even where the transfer and endorsement of the bill of lading was rightful in the first instance, † if it be subsequently converted into a pledge †. Therefore, where goods were consigned from abroad to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor, or his assigns, and the factor [*216] afterwards endorsed and *delivered the bill of lading, together with the goods, to the endorsees, as brokers, *with instructions to do the needful*, and subsequently the endorsees made advances to him on the credit of those and other goods, without knowing that he was not the owner of them, it was held that the endorsees could not retain the goods against the consignor, until payment

the person who had possession thereof held the same as factor only ; it was accordingly contended, that the possession of the bill of lading by the factor without any endorsement to that effect, must be taken as evidence that he had the absolute control over the property, so as to be able to pass it to a third person, who had no notice to the contrary, by endorsement and delivery of such bill of lading to him for a valuable consideration. The court however were of opinion, that these circumstances did not confer on the factor any additional power ; that the symbol could not have a greater operation to enable him to defraud his principal, than the actual possession of that which it represented ; that a factor therefore, could have no power to pledge the goods of his principal by depositing the bill of lading in the hands of a third person, any more than he had the power to do so by so depositing the goods themselves ; and that the pledgee, in such a case, would have no ground to complain of his having been misled by the bill of lading, as it would be easy for him to inquire for the letter of advice which brought such bill,—which letter, it was said, would show whether the pawnor held the goods as factor or vendee.” *Russ. Fact. & Brok.* 119. But a factor having possession of the bill of lading, may, by an assignment thereof, make such a sale of the goods, whilst yet *in transitu*, as will be binding upon the principal : “ For,” says Washington, J. “ if the bill of lading and the endorsement, where one is necessary, direct the goods to be delivered, generally, third persons are not to know but that the property is in the consignee as vendee ; and if a purchase be fairly made, it is nothing less than a sale by the consignor, through the intervention of an agent.” *Walter v. Ross*, 2 Wash. C. C. Rep. 283, 286 ; post, 239.¶

of the debt due to them from the factor on account of those advances.(4)]

Although the factor himself have a lien upon the property pledged, which would entitle him to retain it ; yet this being a personal right, cannot be transferred to the pawnee, so as to give him a title even to the amount of the lien.(h) A different opinion at first entertained by Lord Kenyon upon this point, seems to have been subsequently abandoned by him.(i)

In the case already mentioned,(k) the pledgee, upon a second trial, relied upon the further circumstance in his favor, that the broker was in advance for his principal, and had therefore a lien, of which it was insisted that the pledgee ought to have the benefit. But it was said by the Court to be clear that liens were personal, and could not be transferred by any *tortious* pledge of the principal's goods.(l)

*But this must be understood as applied to the [*217] *tortious* transfer of the goods of the principal by the broker undertaking to pledge them as his own ; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints him as his servant to keep possession of the goods for him, in his name, and as a continuance in effect of his own possession ; in which case he may preserve the lien.(m) And where a consignee

(4) [*Martini v. Coles*, 1 M. & S. 140.]

(h) *Daubigny v. Duval*, 5 T. R. 604.

(i) See 7 East, 7, per Lord Ellenborough.

(k) *M'Combie v. Davies*, 6 East, 538.

(l) *M'Combie v. Davies*, 7 East, 6. In the case of *Daubigny v. Duval*, 5 T. R. 604, the plaintiff had tendered to the factor the amount of his lien ; but in the case of *M'Combie v. Davies*, it does not appear that any tender was made either to the pledgee or the broker.

(m) *Ib.* per Lord Ellenborough, 7 East, 7, 8 ; and see *Man v. Shifner*, 2 East, 523, 529, where the same point is recognized and exemplified. ¶ *Urquhart v. M'Iver*, 4 Johns. Rep. 103 ; *Jarvis v. Rogers*, 15 Mass. Rep. 389, 417 ; 2 Kent's Comm. 639 ; ante, 145 ; Story on Balm. § 324, 325.¶

of goods, for the purpose of sale, deposited them with a broker, who, upon the faith of that deposit, advanced money to pay the duties and other charges upon those goods, he was held to stand in the situation of the consignee, and entitled to retain till his advances were satisfied ;⁽ⁿ⁾ for this formed a particular lien upon the goods not derived from the consignee.⁽⁵⁾

[*218] *Upon the same principle that has been mentioned to govern the case of factors, it has been resolved, that a general power by letter of attorney to sell, assign, and transfer stock, does not authorize the agent to transfer it by way of security for his own debt, though there was no collusion on the part of the pledgee.^(o)

(n) *Pulteney v. Kymer*, 3 Esp. Cas. 182.

(5) [This case appears to have been overruled by the subsequent cases of *Solly v. Rathbone*, and *Cochran v. Irlam*, *supra*, where it was held, that as there was no privity, no lien could be acquired.]

(o) *De Bouchot v. Goldsmid*, 5 Ves. Jun. 211.

|| The general rule as to the right of the principal to repudiate the unauthorized act of his factor, is well summed up in *Russ. on Fact. & Brok.* 87, 88. After referring to various cases on the subject, the author proceeds: "So, it appears, that where the person with whom a known factor or broker deals has no notice of the extent of his actual authority, the principal will, notwithstanding, be at liberty to repudiate any contract entered into by him, which is beyond the scope of the general authority of that class of agents, unless he has enabled the factor or broker to deceive third parties, by furnishing him with the means of concealing his representative capacity. The reason of this appears to be, that persons engaged in mercantile transactions must be presumed to know what contracts are within the limits of the general authority of a factor or broker ; and that therefore before entering into a contract which is not of this character, they are bound to inquire into the real authority of the person with whom they are about to contract. Thus, whilst on the one hand, the law protects the persons dealing with this class of agents, by binding their principals by all contracts entered into with them in the ordinary course of their business, so on the other, the principal is protected wherever the contract is not of this character. The agent in this latter case has not been clothed with an apparent authority—for that, as we have seen, can be presumed to extend only to acts within the scope of his usual employment ; and accordingly when he goes beyond this, it becomes the duty of third persons to inquire into his real authority, nor can they neglect to do so, except at their own peril. At the same time, if the principal enables his factor or broker so to deal with property as to conceal

‡ It seems, therefore, that before the passing of the statutes presently to be adverted to, the law stood thus :—A *broker* employed to purchase had, as such, no authority to sell ; and his principal might reclaim goods disposed of by him, into whatever hands they had come, unless, 1st, it were a *bona fide* sale in market overt, which the policy of the law never permitted to be disturbed ;(A) or 2dly, the

his representative capacity, and thereby to mislead third parties, there can be no doubt that he will be bound by such dealings, even although the agent may, by engaging in them, have exceeded his general authority.” §

(A) § It is an universal principle of law that no one can transfer to another, a greater or higher interest in any given subject, than he himself possesses. The finder of a lost article is bound to restore it to the owner ; and if he make a *bona fide* sale of it to a third person, the title of the original owner still continues attached to the article, no matter through however many hands it may have passed ; and may pursue it through all its different transmutations until there is an end of identity. It is the same as to stolen goods ; the purchaser from a thief, however innocently and ignorantly he may have bought the stolen property, is obnoxious to restitution to the true owner. *Nemo plus juris in alium transferre potest quam ipse habet.* The English law of *market overt* is an exception, and an acknowledged exception to the general rule ; and is an instance to which the saying may apply—*exceptio probat regulam.* And even in a sale in market overt the great principle of equity applies, that the purchaser must be unaffected by any knowledge of the weakness of the title of him from whom he buys.

The law of market overt is stated in 2 Kent's Comm. 323, 324, and by Walworth, Ch. in *Hoffman v. Carow*, 22 Wend. 290. In this case, the Chancellor delivering his opinion in the Court of Errors, says : “ It is known to the professional members of the court, that in the market towns in England there are periodical fairs, where property is bought and sold, called market days ; and that by the custom of the city of London, every day, except Sunday, is a market day ; and every tradesman's shop is a market overt for those things in which he usually deals at that place ; and that by the common law, a sale in a market overt actually changes the title to the property in favor of a *bona fide* purchaser thereof, even though it has been stolen from the rightful owner. The only remedy of the owner of stolen property to recover it again, under such circumstances, at the common law, was to pursue his appeal against the felon to conviction, and then he was entitled to restitution of his goods, although they had been sold in a market overt. So, also, if goods were stolen, and the thief abandoned or waived them in his flight, they were forfeited to the crown, or the lord of the manor, unless the owner proceeded upon his *appeal* to attain the thief. But as this attempt to convict the felon by a private suit was very incon-

principal had himself allowed the broker to mislead the party to whom the transfer had been made, by enabling him to appear in the character of owner.(B) A *factor* had, as incident to his character of factor, a right to *sell*; but he had no right to dispose of the property of his principal in any other manner, whether by barter, or by pledge, or by deposit for the purpose of being sold by another; and if he did so, the principal might follow the property or the proceeds, so long as it could be specifically traced, [*219] and to *recover it absolutely and free of all charges; for the transferee could not claim in right of the factor—lien being a personal and intransferable right—nor in his own right—because the possession out of which the lien must arise was, as against the owner, a *wrongful* possession.(c)

Nor could the effect of this rule be evaded by a colorable sale. The court looked to see what was the true nature of the transaction, and adjudged accordingly. What

venient and expensive to the owner of stolen property, the statute 21 Hen. VIII. ch. 11, was enacted, by which the stolen goods were directed to be restored to the owner upon his procuring a conviction of the thief, upon an *indictment* in the ordinary way, without the necessity of an appeal. Under this statute it is the settled law in England, that upon the conviction of the offender, the owner is entitled to be restored to his property, notwithstanding it may have been sold to a *bona fide* purchaser in a market overt." It is understood that the English law as to markets overt does not prevail anywhere within the United States. *Ventress v. Smith*, 10 Peters, 161; *Wheelwright v. Depeyster*, 1 Johns. Rep. 480; *Mowrey v. Walsh*, 8 Cowen, 238; *Hoffman v. Carow*, 22 Wend. 285, 292, 294; *Dame v. Baldwin*, 8 Mass. Rep. 518; 2 Kent's Comm. 324, 325. It has been held by the Court of Errors of the state of New York, that an auctioneer who sells stolen goods, is liable to the owner in an action of trover, notwithstanding that the goods were sold by him, and the proceeds paid over to the thief without notice of the felony; and notwithstanding that the owner has not proceeded criminally against the thief. *Hoffman v. Carow*, *ubi supra*. By the Revised Statutes of New York, (vol. 2, p. 220, 2d ed.) which is merely a re-enactment of previous legislative provisions, the civil remedy is not merged in the felony, nor is it "in any manner affected thereby."||

(B) || Post, 325; 2 Kent's Comm. 627; 1 Liv. Pr. & Ag. 149.||

(c) || Ante, 25; post, 341.||

was originally a pledge, and consequently wrongful, could not be legalized by the subsequent formalities of sale; nor conversely could the previous formality give validity to the transaction, if it appeared from the subsequent mode of dealing, that in substance it was a mere advance on the security of the goods. Neither did it vary the case, that the factor himself was under advances for his principal, which the goods were *bona fide* pledged to meet; nor even that the principal had drawn upon the factor on the faith of those very goods(Δ)—no inference of an authority to pledge being suffered to arise from what was in fact a not uncommon arrangement between the principal and his correspondent. And lastly, it was equally immaterial whether the pledgee knew that he was dealing with a factor, or whether he acted under a *bona fide* impression that the holder of the goods or documents was himself the real owner.

Still, in the case of the factor, as in that of the *broker above mentioned, if the principal had by [*220] his own incaution, or for his own convenience, enabled the factor to mislead the parties with whom he had dealt, into a belief that he was himself the owner, he would have been precluded from claiming restitution. But it was clear that the mere *possession* of the goods by the factor was not sufficient to mislead—because *that* as factor he would necessarily have—nor, therefore, the holding of a document entitling him to the possession, such as a bill of lading or dock warrant—because the right to possess being less than the actual possession could not, to say the least, confer a larger title. In fact, the only mode in which the principal could bring himself into wrong in this way, was by allowing the *invoices* to be made out to the factor or purchaser, and this therefore seems to be the only exception which could have been made available to a pledgee.(1)

(Δ) || Ante, 215, n. (3).||

(1) † See, in support of the propositions in the text, the following cases, in addition to those which have been already cited in the text and notes:

The rules here laid down being inflexibly adhered to by the courts, notwithstanding the seeming hardship of particular cases, gave rise to some complaints among [*221] mercantile men: and *indeed, several of the judges had themselves, in administering the law as they found it handed down to them, seemed to intimate a wish, that it had been originally settled otherwise.(2) Others, however, had vindicated both the justice and policy of the common law in establishing and maintaining the restriction, and good reasons were not wanting on either side to support their several opinions.(3) Neverthe-

Glynn v. Baker, 15 East, 509; *Boyson v. Coles*, 6 M. & S. 14; *Kuckein v. Wilson*, 4 B. & A. 443; *Guichard v. Morgan*, 4 Moore, 36; *Gill v. Kymer*, 5 Moore, 303; *Duclos v. Ryland*, ib. 518, n.; *Barton v. Williams*, 5 B. & A. 395; *Williams v. Barton*, 3 Bing. 139; *Steirnel v. Holden*, 4 B. & C. 5; *Jackson v. Clarke*, 1 Y. & J. 210.

(2) † See the observations of Lord Ellenborough and Le Blanc, J. in *Martini v. Coles*, 1 M. & S. 148; and of Best, C. J. in *Williams v. Barton*, 3 Bing. 139. ‖ And see ante, p. 213, n. (d).‖

(3) † See the remarks of Abbott, C. J. ‖ afterwards Lord Tenterden,‖ and also of Bayley, Holroyd, and Best, Justices, in *Duclos v. Ryland*, 5 Moore, 518, n. “It is now too late,” observed C. J. Abbott, “to consider whether a factor can or cannot pledge the goods of his principal. The rule of law is too well established to be now disturbed. The argument which has been addressed to us as to the hardship of the law has been urged in every case in which this question has been considered. The answer to it is, that he who advances his money, ought to take care to protect himself against the fraud of the person to whom he advances. This caution is as necessary to the foreign as the English merchant. He who sends his goods to this country for sale, ought to be secure in the confidence he reposes in the honesty of our merchants; that is the policy of the English mercantile law. The rigid adherence to the rule, that a factor cannot pledge goods of his principal, will only have the effect of making people more careful how they advance their money; and nothing is more easy than the exercise of that caution, viz. by requiring the person who desires to have an advance of money, to show his title to the property on which he asks such advance. This will not destroy that wholesome confidence which ought to exist between merchants. If people will blindly advance their money to those who ask for it without exercising a little caution, they must take the consequences of their own indiscretion.” ‖ And see *Queiroz v. Trueman*, 3 Barn. & Cress. 342, where the Chief Justice expresses himself to the same effect.‖ The arguments for and against the policy of the change are

less, by the *exertions principally of the moneyed [*222] capitalists in London, whose interests were most affected by the existing state of the law, in the year 1823 an Act of Parliament was obtained (4 Geo. IV. c. 83,) by which material alterations were introduced for the benefit of persons dealing with factors : and after an experience of two years, the main provisions of it were incorporated into the amended act of 6 Geo. IV. c. 94, by which the rights of factors, or rather of persons dealing with them, are now, so far as regards the subject under consideration and some other matters, definitively settled.(A)

By the first section of this act, the person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person to his use, *if he has not notice by the bill of lading or otherwise*, at or before the advance or receipt, that such person is not the actual and *bona fide* owner of the goods ; and such person shall be taken for the purposes of the act to have been entrusted with goods for the *purpose of consignment or of sale [*223] unless the contrary be made to appear.

By the 2d section, a person entrusted with and in possession of a bill of lading, certificate, or warrant or order for the delivery of goods (the several species of which are enumerated) is to be deemed the true owner of the goods described therein, so far as to give validity to any contract made by him for the sale or disposition of the goods, or the *deposit or pledge thereof*, if the buyer, transferee, or pawnee, has not notice by the document or otherwise, that such person is not the actual and *bona fide* owner of the goods.(B)

briefly summed up in a note to the case of *Blandy v. Allan*, Dan. & Lloyd's Merc. Cases, 29.↓

(A) || But that they were not *definitively* settled, appears from the Statute 5 & 6 Vict. c. 39, which will be fully noticed in the sequel.||

(B) || Under this section of the act of 6 Geo. IV. the construction was,

By section 3, any person taking goods in deposit or pledge from the party in possession, without notice that he is not the owner thereof, *for a pre-existing debt*, shall ac-

that a factor was not authorized to pledge the goods of his principal, when he had possession only of the goods themselves, but that to enable him to exercise this power under the statute, it was requisite that he should have in his hands some document showing the title to the goods, which document might be so marked as to show whose goods they were. *Phillips v. Huth*, 6 Mees. & Wels. 572; Russ. Fact. & Brok. 129, 132. In a subsequent case this decision was approved of and confirmed; Lord Denman, delivering the judgment of the Court of Exchequer Chamber, saying: "The legislature has enabled the factor to pledge goods, not when he has the possession only of the goods, because the owner cannot ear-mark them, and so give the pawnee notice that they are not the property of the factor, but where he has a document showing the title to the goods, which may be so marked as to show whose the goods are; therefore, if the owner does so mark the document, the factor cannot pledge; if the owner does not so mark it, he holds the factor out to the world as owner, and must take the consequence. But he cannot be justly said to hold the factor out to the world as owner by such document, unless he has entrusted him with the document; and hence the legislature has made such *intrusting* a necessary circumstance to bring the case within the operation of the statute in question." *Hatfield v. Phillips*, 9 Mees. & Wels. 647. The rigid construction given by the courts, in this and other cases not here referred to, of this section of the Statute Geo. IV. induced the enactment of the Statute 5 & 6 Vict. which will be found in the appendix. Russ. Fact. & Brok. 140-143; 9 Mees. & Wels. 650, n. (a).

A factor, after depositing dock-warrants with the defendant as a security for the advance of money, withdrew them from the defendant's hands and substituted other dock-warrants for silk belonging to the plaintiffs, the defendant having no notice that A. was not the true owner. It was held, that this transaction was not protected by the second section of the Factors Act, (6 Geo. IV. c. 94,) there being *no advance* of money on the faith of such warrants; and that the plaintiffs might recover the value of such silk in trover. *Bonzi v. Stewart*, 4 Mann. & Gran. 294. Where a factor, the consignee of goods for sale, and endorsee of the bills of lading, had landed and warehoused the goods and taken the wharfinger's certificates and dock-warrants in his own name, and then pledged the certificates and warrants for an advance of money on his own account:—it was held that such pledge was not protected by Statute 6 Geo. IV. c. 94, s. 2, in an action of trover by the real owner of the goods. *Close v. Holmes*, 2 Moody & Robinson's Rep. 22; cited 2 Steph. N. P. 1921. See further *Stevens v. Wilson*, 6 Hill, 512, of which a full statement will be found, *post.*||

quire such right, title, or interest, and no further or other than was possessed by the person making the deposit or pledge.

By the 5th, any person may accept goods or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent ; but in such case he shall acquire such right, title, or interest, and no further or other than was possessed by the factor or agent at the time of the deposit or pledge.

And by the 4th section, any person may contract for the purchase of goods with any agent *entrust- [*224] ed with the possession of them, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he may have notice that the person with whom he contracts is an agent, if such contract and payment be made in the usual course of business, and he has not at the time of contract or payment, notice that the agent is not authorized to sell or to receive the price.

It is further provided, that the act shall not prevent the true owner of the goods from recovering them from his factor or agent before a sale, deposit or pledge, or from the assignees of such factor or agent in the event of his bankruptcy, nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent ; nor from recovering the goods deposited or pledged upon repayment of the money, or restoration of the negotiable instrument, advanced on the security thereof, to the factor or agent, and upon payment of such further money or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent, or on payment of money equal to the amount of such instrument ; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods, after deducting the money or negotiable instrument advanced on the security thereof. And in case of the bankruptcy of the factor or *agent, the [*225] owner of the goods so pledged and redeemed shall

be held to have discharged, *pro tanto*, his debt to the estate of the bankrupt.(4)

It will be seen from this abstract, that as regards the dealing with factors or consignees in the way of purchase, the act is merely a confirmation of the common law. Of payments to the factor in respect of such purchases, (as to which the same observation is applicable,) we shall have occasion to treat hereafter. The remaining provisions by which the alterations are introduced may be classified thus :

It sometimes happens that for the convenience of the merchant goods are shipped in the name of a factor. But by the common law a consignee who made advances to the shipper, on the faith of his being the owner, had no lien upon the goods against the person to whom they really belonged. By the present act this lien is given to him.

As to the right of the factor to pledge or deposit, there are three distinct cases: 1st. where goods, or documents for the delivery of goods, are taken in pledge as a security for *advances, with a knowledge* that they are not [*226] the property *of the person pledging them. By this transaction the person to whom they are pledged acquires the same right upon them, which the factor could have enforced against the owner at the time of the deposit, or to speak more technically, the lien of the factor against his principal is transferred to the pawnee. The second is, where goods are taken in pledge from a factor *without notice* that they are the property of another, as a security for a *pre-existing debt* of the factor to the pledgee; this pledge also gives to the pawnee the same right as the last. The third is, where documents for the delivery of goods are received in pledge from the holder, as a security for advances made upon the faith of those

(4) The act is given at length in the Appendix. The above abstract is for the most part a transcript of that given by Lord Tenterden in "The Treatise on Shipping," 5th edit. which it was difficult to alter without rendering it worse.

documents, without notice *either from the documents themselves or otherwise*,⁽⁵⁾ that the holder is not the owner of the goods described ; and in this case the pledgee has power given him by the statute to retain the documents, and by consequence the goods, until these advances are repaid—in other words, he has an absolute lien upon them for the whole amount.

It is to this last provision that the objections urged against the act principally apply. The others seem to be equitable enough, for surely it is but just that the owner should, before obtaining *possession of the [*227] goods, satisfy the *bona fide* claim of the factor, and but reasonable that the factor should have the power of availing himself beneficially of that just claim, by transferring it for value to another.

But the policy of the more extensive privilege conferred by the second section is certainly questionable ; and although the purpose of this treatise is rather to state what is law, than to criticise it, it may not be out of place to remark that the courts seem inclined to confine the operation of the second section within close limits, whilst the juries on the other hand seem equally inclined to extend it.

The privilege conferred by that section applies only to a case where the pledgee has not notice either from the document, *or otherwise*, that the holder is not the true owner. What shall be considered as amounting to notice becomes therefore a very material question ; and it seems to be now generally understood—perhaps it may even be considered as established—that it is not necessary for the owner, seeking to recover property thus alienated, to show that the pledgee *had positive information* that he was dealing with a mere agent, but that it is sufficient if the circumstances are shown to have been such as might, and with a reasonable man would, have led to that conclusion.

(5) These words “or otherwise” were introduced, it is said, by Lord Eldon in committee. They have altered the whole character of the section.

In the following case the jury were directed accordingly by Lord Tenterden. The plaintiffs *had [*228] purchased from Nevitt & Co., brokers in Liverpool, some chests of indigo, the warrants for which having been suffered to remain in the hands of the brokers, were pledged by J. Nevitt, one of the firm, with the defendants, who afterwards obtained the indigo under them. The main question in the cause was, whether the defendants had *notice* within the meaning of the second section, that J. Nevitt was not the owner; and Lord Tenterden intimated in the course of the trial, that if the defendants had even *good reason to suspect* that he was not, that would be notice sufficient to deprive them of the protection of the statute. Much evidence was given for the purpose of raising this inference, and the effect of the whole appeared to be, that the defendants must have known that J. Nevitt held the warrants merely as broker. Some observations were made by the counsel for the defendant, in his address to the jury, on the intimation which had fallen from the Chief Justice, and his lordship therefore, in summing up to the jury, may be supposed to have been careful in expressing himself with accuracy. "The expression of the statute," his lordship said, "is, that a party is to be entitled to its protection if he shall not have notice by the documents or otherwise, that the pledger was not the actual and *bona fide* owner of the goods pledged.

A person may have knowledge of a fact either by [*229] direct communication, or by being *aware of circumstances which must lead a reasonable man, applying his mind to them and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of those ways is enough, I think, to exclude a party from the benefit of the provisions of this statute. Slight suspicion, I think, will not. The question I shall leave to the jury in this case, where there is no evidence of direct communication, is, whether the circumstances were such that a reasonable man, and a man of business, applying his understanding to them, would know that the goods were

not Nevitt's, if so, the defendants are not entitled to retain them." The jury found a verdict for the defendants.(6)

By other cases in which questions have arisen upon the construction of this act, it has been determined, that the "negotiable instruments" mentioned in the second section *as a security*, are such as pass by endorsement and delivery, as bills of exchange and promissory notes, and not East India warrants, or other documents of that nature ;(7) that the third section, which transfers to a person taking goods in pledge for an antecedent debt the same *right as the factor had at the time of pledge, does [*230] not prevent the owner from bringing an action of *trover* against him to recover them, though the measure of damages may be the balance only, after deducting what was due to the factor(8)—that if the pawnee retain the goods, the sum due to the factor ought to be tendered by the owner ; but that if he have sold them before demand, such tender is unnecessary(9)—and that to bring a party within the protection of the fifth section, the transaction must be strictly a deposit or pledge, and that a *sale*, fraudulent on the part of the factor as against his principal, cannot be converted into such a deposit or pledge as to give a lien to the purchaser.(10)

This fifth section has also given rise to a point of some importance. A broker, under liabilities for his principal, pledged, without his knowledge, India warrants and goods, for advances to meet those liabilities, at the same time communicating to the pledgee the name of the real owner.

(6) † *Evans v. Trueman*. The report here given is taken partly from 2 Moody & M.'s N. P. C. 10, and partly from the notes and recollection of the editor himself. The verdict certainly occasioned some surprise.†

(7) † *Taylor v. Truman*, Lloyd & Wels. 184 ; 1 Moody & M. 453. And the same point was determined in the very recent case of *Taylor v. Kymer*, B. R. Trin. Term, 1832.†

(8) † *Taylor v. Truman*, Lloyd & Wels. 184 ; 1 Moody & M. 453.†

(9) † *Ibid.*†

(10) † *Thompson v. Farmer*, 1 M. & M. 48.†

The principal having subsequently taken up the broker's acceptances, and thereby released him from his liabilities, claimed from the pledgee the goods and warrants, which the latter refused to deliver, unless on re-payment of his advances, the broker having, in the meantime, become [*231] bankrupt. The question was, whether, under the fifth section, the pledgee had any and what lien; and it was resolved by the court, that he did by the pledge acquire all the right which the broker himself then had—that the then right of the broker was a right to an indemnity against the outstanding acceptances, and therefore conditional—that if the acceptances had not been taken up when due, the right would have become absolute in the broker, supposing no pledge to have been made, and by consequence in the pledgee, to whom they had been so transferred—but that on discharge of the liabilities, as the right of the broker would have expired had there been no pledge, so in the existing case would the right of the pledgee, which was, by the express words of the statute, the *same* right transferred.(11)

In a subsequent case, nearly the same point arose before Chief Justice Best at Nisi Prius, who also directed the jury to find against the claim of the pledgee. But his lordship seems to have decided on another ground, and one which with great deference, is hardly maintainable; for he was of opinion, that the pledgee, even during the continuance of the liabilities, *never had any lien at all*, because, as his lordship observed, the only right which he could acquire under the fifth section of the statute, was such a [*232] *right as the pledgee could *himself have enforced at that time*; and as the right was then contingent, it was clear that it could not have been enforced by him against his principal.(12) His lordship, however, seems to have given too narrow a construction to the words

(11) † *Fletcher v. Heath*, 7 B. & C. 517.†

(12) † *Blandy v. Allan*, Dan. & Lloyd, 22.†

on which he relied ; for although the right to indemnity, which a factor under liabilities for his principal undoubtedly has, is not a right which he can *actively* enforce, yet it is manifest that he may render it efficacious, or, in other words, *put it in force*, by retaining the property of his principal until the liability is discharged ; and such right, therefore, he may also, under the provision of the fifth section, transfer to a pledgee.

In a recent case it was contended, among other things, that the delay of the principal in making known that he was owner to a pledgee, who had taken goods without notice, was a confirmation or adoption of the pledge. Upon which Lord Tenterden, in giving judgment, observed, that he could not understand how a mere nonfeasance could be an act of confirmation, unless it were followed by certain consequences. If it had appeared that the consequences of his forbearing to give notice had been an alteration in the defendant's situation for the worse, or even of his own *for the better, there might have [*233] been ground for the argument.(13)†

(13) † *Robertson v. Kensington, Lloyd & Welsby's Merc. Cases*, 187. In that case an application was afterwards made to the court on behalf of the plaintiff (the owner of the goods), to allow the damages to be increased by adding to the value of the goods the amount of rent and other expenses paid, or to be paid, to the East India Company, in whose warehouses the goods had been deposited ; which application was granted. *Ibid.* note.‡
‡ An act of parliament, (5 & 6 Vict. c. 39, which will be found in the Appendix,) has been subsequently passed, (June 30, 1842,) to amend the preceding act of 6 Geo. IV. c. 94. The following synopsis of the statute of Victoria, so far as relates to the present subject, is borrowed from *Russ. on Fact. & Brok.* 142, et seq.—By section 1, it is enacted : That any agent entrusted with the possession of goods, or of the documents of title to goods, may make a valid pledge of the same, as well for any original advance *bona fide* made on the security thereof, as for any continuing advance in respect thereof, notwithstanding the pledgee shall have notice that the person pledging is only an agent. As to the construction of this section see *Leareyd v. Robinson*, 12 Mees. & Wels. 745.

Section 2d enacts : That contracts for pledge made in consideration of the transfer to such agent of any other goods, documents of title, or nego-

liable security, on which the pledgee had at the time a valid and available lien in respect of previous advances, if *bona fide* on the part of the person with whom the contract is made, shall be considered as valid and effectual as if the consideration of the contract had been a *bona fide* present advance of money. But the pledgee, in such case, is to acquire no lien on the goods &c., deposited in exchange, beyond the real value of the goods &c., exchanged.

Section 3d enacts: That the act shall not be construed so as to protect any contract not made *bona fide* and without notice that the agent has no authority to make the same, or that he is acting *malis fide* in so doing; nor so as to protect any lien or pledge for any antecedent debt.

Section 4th explains the meaning of the term "document of title:" it then goes on to enact: That "any agent entrusted as aforesaid and possessed of such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been entrusted with the possession of the goods, or any other document of title thereto," shall be taken to have been "entrusted" within the meaning of the act;—that such agent shall be taken to be "possessed" of goods &c., within the meaning of the act, whether the goods &c., be in his actual custody, or be held by some other person for him;—that advances made *bona fide* to such agent, on the faith of any agreement in writing to deposit goods &c., shall be taken to be within the meaning of the act, provided such goods &c., shall be actually received by the person making the advance, without notice of such agent's want of authority, although they should not be so received until a period subsequent to the making of the advance;—that any agreement, whether made with such agent, or with a clerk or other person on his behalf, shall be taken to be an agreement with such agent;—that the term "advance" shall extend to any payment whether made in money, bills of exchange, or other negotiable securities; and that the mere possession of goods &c., by such agent shall be evidence of his having been "entrusted" therewith, unless the contrary be made to appear.

The statute likewise contains provisions respecting fraudulent pledges by agents, (sec. 6,) and also respecting the right of the owner of goods to redeem the goods pledged, or to recover the balance of the proceeds thereof, (sec. 7,) similar to those contained in the 6 Geo. IV. c. 94.

Statutes in reference to the same subject, and for the protection of *bona fide* pledgees, have been enacted by the states of Rhode Island in 1831, and of Pennsylvania in 1834. There was a previous statute of the state of New York passed April 16, 1830, which will be stated in full in the Appendix. By § 1 of this act, every person in whose name any merchandize shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandize to a lien thereon: 1. For money advanced, or negotiable security given by him to or for the person in whose name the shipment shall have been made; and 2. For any money or negotiable security received by the nominal shipper to or for the use of such consignee. But by § 3, the lien shall not attach where the con-

signee has had notice, by the bill of lading or otherwise, that the nominal shipper was not a *bona fide* owner.

By § 3, an agent entrusted with the possession of the bill of lading, or certain other documentary evidence of title;—or without having such documentary evidence, shall be entrusted with the possession of merchandize for the purpose of sale, or as security for future advances, shall be deemed the true owner, so far as to give validity to any contract made by him for the disposition thereof;—for money advanced,—or written security given by such other person on the faith of such possession by the agent. But, by § 4, the depositary of such merchandize &c., by the agent for an antecedent debt or demand can claim no higher right against the principal, than the agent had at the time of the deposit.—Nor, (§ 5,) is the true owner to be prevented from reclaiming the merchandize from the depositary, upon repayment of the money advanced, or restitution of the security given, and on satisfaction of the lien of the agent who made the deposit; nor is he precluded from recovering the produce of the sale of such merchandize from the depositary, after satisfying his just dues. And the act (§ 6,) does not apply to common carriers, warehouse keepers, *et hoc genus omne*.

The two following cases have arisen under the third section of the statute of New York.—An action of trespass was brought in the Superior Court of the city of New York, for taking and carrying away a quantity of merchandize sent by the plaintiff to the mercantile firm of Butler & Co., in New York, to be sold on commission. Butler & Co. had, in October 1834, put into the hands of two of the defendants transacting business in New York, under the name of Merrill & Bowen, an invoice of goods received from the plaintiff, amounting to \$3135 19, with a note attached, that they considered the goods as the property of Merrill & Bowen to be removed at their pleasure. The goods were then in the store of Butler & Co. The invoice was delivered to Merrill & Bowen to *secure them for endorsements to be made on the faith of it, upon the paper of Butler & Co., to about the amount of \$2500, as the same should be wanted by the latter firm in making purchases*. In the latter part of the said month of October, Merrill & Bowen endorsed two notes for Butler & Co., amounting together to \$2301 33, which they were subsequently obliged to pay. The members of the firm of Butler & Co., having absconded, Merrill & Bowen, in December of that year, took possession of the goods specified in the invoice; and shortly after, the plaintiff, who was the consignor, brought this suit. The Chief Justice of the Superior Court charged the jury, on the trial, that if they should find that the endorsements of Merrill & Bowen were given *under the contract* between them and Butler & Co., relative to the property in question, *and upon the faith thereof*, the defendants were entitled to a verdict. A verdict was rendered for the defendants, and judgment entered accordingly, which, having been brought up on a bill of exceptions was affirmed by the Supreme Court.—Nelson, C. J. “This case turns upon the true construction of the 3d section of the act of 1830, which provides that, ‘every factor or other agent entrusted with the possession of any bill of

lading &c., or who shall be entrusted with the possession of merchandize for the purpose of sale, or as security for any advance to be made or obtained thereon, shall be deemed the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for sale or disposition of the whole or any part of such merchandize, for any money advanced, or negotiable instrument, or *other obligation in writing, given by such other person upon the faith thereof.*' The agreement in anticipation of future endorsements was no doubt inoperative under the statute, till the liability was actually assumed; but after that, we perceive no substantial reason against giving it full effect. When the liability of Merrill & Bowen was assumed, the contract was unrescinded and existing, and the jury have found the endorsements were made upon the faith of it. There is nothing in the statute requiring that the contract should be made at the point of time the money is advanced, or the negotiable instrument or other obligation in writing given—all it exacts is, that one or the other should take place upon the faith of it. There must be a contract of sale or pledge existing at the time of the advance or obligation entered into, but it may have been previously arranged, and if open and unrescinded, is as binding and operative under the statute, as if then made." *Jennings v. Merrill*, 20 Wend. 9.

Wilson and others brought an action of replevin in the Superior Court of the city of New York against Stevens, for a quantity of feathers. The plaintiffs were merchants doing business in Kentucky. The defendant was a commission merchant in the city of New York, and Colgate was also a commission merchant there, and was the factor of the plaintiffs. In the fall of 1840, the plaintiffs sent Colgate a large quantity of feathers to be sold; which he delivered to the defendant and directed him to sell them. The defendant afterward made advances to Colgate on account of the feathers to about the sum of \$3000; and in December following, Colgate failed, then being a debtor to the plaintiffs. The defendant had previously sold a part of the property, and rendered an account to Colgate. The plaintiffs demanded the feathers which remained unsold; but the defendant claimed to hold them for the balance of his advances to Colgate; and the plaintiffs thereupon brought this action of replevin. Evidence was given to show that the defendant knew the plaintiffs owned the property at the time he made the advances to Colgate. The judge charged the jury, in substance, that if the defendant made the advances to Colgate with knowledge that he was not the owner of the goods, the plaintiffs were entitled to recover. A verdict and judgment were rendered for the plaintiffs; and the case coming up, upon a bill of exceptions taken at the trial, the Supreme Court affirmed the judgment of the court below.—Bronson, J. "At the common law, although a factor could sell the goods of his principal, he had no incidental authority to dispose of them in any other way. He could not barter or pledge the property, or deposit it as a security for his own debt, or for advances made for his own benefit. This rule sometimes operated as a hardship upon those who dealt with a factor in the belief that he was the true owner, and the Statute 6 Geo. IV. c. 94, was made to remedy the mis-

chief. Since that time our own legislature has passed an act for the amendment of the law relative to principals and factors. The defendant insists, that by virtue of the third section of this statute, he can hold the goods for the amount of his advances to Colgate, the plaintiff's factor, although he knew, at the time he was making the advances, that he was not dealing with the owner of the goods. To that doctrine I can by no means subscribe. The statute was not made to legalize fraud; but to protect those who honestly trusted to appearances, and supposed they were dealing with the true owner. The first section provides, that every person in whose name any merchandize shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee to a lien for advances, &c. But this is qualified by the second section, which expressly takes away the lien where the consignee had notice, by the bill of lading, or otherwise, before advancing the money, that the person in whose name the goods were shipped was not the actual owner. By the third section, 'every factor or other agent, entrusted with the possession of any bill of lading &c., and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandize for sale, or as a security for any advances to be made or obtained thereon, *shall be deemed to be the true owner thereof*, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandize, for any money advanced, or negotiable instrument, or other obligation in writing, given by such other person *on the faith thereof*.' In strict grammatical construction, the words 'on the faith thereof' may refer to 'merchandize' as the last antecedent. But in point of good sense as well as sound morals, the reference is to the words 'shall be deemed the true owner thereof.' The obvious meaning is, that the factor or other agent who has been entrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him 'upon the faith thereof;' that is upon the faith induced by the usual *indicia* of title, that he was the true owner of the property. The second section of the British statute, which answers very nearly to the third section of our own, contains a proviso which expressly saves the rights of the true owner when the pledgee had notice that he was dealing with an agent; and our statute though framed in a different manner, was evidently intended to produce the same result. It is impossible to suppose that the legislature intended to enable the factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances knew that he was not dealing with the true owner. The construction which I have given to the third section, is confirmed by the provision made by the first and second sections in favor of the consignee.—It is said that this construction will make a great inroad upon the usual course of mercantile transactions, and that hereafter no one can safely deal with a factor or commission merchant. Men may safely purchase from a factor knowing him to be such, for the reason that a sale is within the general scope of his

But the rules neither of the common law, nor of the statute, affect the transfer of negotiable securities or instruments, in which the property passes by delivery alone, such as navy bills, or bills of exchange endorsed in blank.(p) For it has been held that endorsed bills deposited with a banker for the purpose of being received when due, if pledged by the banker for his own debt, cannot be followed by the owner into the hands of the pledgee.(q) For with respect to instruments of this description the title of a *bona fide* holder is derived from the instrument itself, and not from the title of the person he received it from;(r) and therefore the only question is as to the fairness of the transaction.(A) And though bankers be [are,] as between

authority. But he has no power to barter, pledge or create a lien upon the goods of his principal; and persons who deal with a factor for any of these purposes, with a knowledge of the character in which he acts, can acquire no rights as against the real owner. If it is desirable in any case that the factor should have the right to pledge, as well as to sell the goods, such a power can easily be conferred by the principal." *Stevens v. Wilson*, 6 Hill, 512.¶

(p) *Goldsmid v. Gaden*, 1 Bos. & Pull. 649; *Collins v. Martin*, ib. ante, ¶ 94, n. a.¶

(q) *Collins v. Martin*, 1 Bos. & Pull. 649. (See ante,) ¶ 94, n. a.¶

(r) 1 Burr. 452; 3 Burr. 1516; Salk. 126; 3 Atk. 56; *Peacock v. Rhodes*, Doug. 633; † *Beauchamp v. Parry*, 1 B. & Ad. 89; *Lloyd & Wels*. 334, per Parke, J. ‡ ¶ Post, 234, n. 13, and the language of Story, J. there quoted. The endorsement of a negotiable instrument is not simply the transfer of the paper, but a new and substantive contract. *Slacum v. Pomeroy*, 6 Cranch, 221; *Van Staphorst v. Pearce*, 4 Mass. Rep. 262.¶

(A) ¶ The principle by which a preceding party to a negotiable paper, is precluded from contesting its validity as against a subsequent *bona fide* holder, is well and clearly expressed by Kent, Ch. "Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, *fraudulently*, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud." *Bay v. Coddington*, 5 Johns. Ch. Rep. 54, 56. And again, in the latter part of his opinion, (Ib. 58,) the doctrine is more fully developed. "In short" the Chancellor says, after an examination of authorities, "I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title in law or equity, as the true owner, unless he received it not only without notice, but in the course of business, and for a fair and valu-

themselves and *their customers, considered for [*234] some purposes as factors,(s) yet, as to third persons, there is an essential distinction between goods of which the property and possession may be in different persons, and bills of exchange, in which, for the purpose of rendering them negotiable, the right of property passes with the bills.(t)

‡ The following instruments have been considered as possessing the quality of negotiability by mere delivery. • Bank notes(13)—bills of exchange payable to bear-

able consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." And see *Coddington v. Bay*, (in error,) 20 Johns. Rep. 637; *Stalker v. McDonald*, 6 Hill, 93; *Swift v. Tyson*, 16 Peters, 1; *Boggs v. Lancaster Bank*, 7 Watts & Serg. 331; ante, 119, n. (t) *sub fine*. That the protection is not extended to an instrument negotiated after it has become due; see ante, 119, n. (t)

The holder of a negotiable instrument is, *prima facie*, to be deemed the rightful owner. But as is hinted above, and as will be alluded to in a subsequent passage, (post, 238,) a person receiving a negotiable instrument may, under circumstances, be bound to look further than the right of property impliedly arising from possession. See further *Patterson v. Hardacre*, 4 Taunt. 114; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, id. 259; *Dean v. Hewit*, 5 Wend. 257; *Vallett v. Parker*, 6 Wend. 621; *Safford v. Wyckoff*, 4 Hill, 442; *Ellis v. Wheeler*, 3 Pick. 18. "Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." Lord Denman; *Goodman v. Harvey*, 4 Ad. & Ell. 870.¶

(s) Ante, p. 89, 90.

(t) See the judgment given by C. J. Eyre, 1 Bos. & Pull. Rep. 651.

(13) ‡ *Miller v. Race*, 1 Burr. 452; *Clarke v. Shee*, Cowp. 200; *Solomons v. Bank of England*, 13 East, 135, n.; *Lowndes v. Anderson*, 13 East, 130.‡ ¶ A bank note payable to a fictitious person, or bearer, is an instrument transferable by mere delivery. *Bullard v. Bell*, 1 Masson, 243. In this case (p. 252,) Story, J. says: "A note payable to bearer, is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by, or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay

any person who shall become the bearer. It is therefore payable to any and every person, who successively holds the note, *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer. *The case is still stronger in relation to bank notes*; for in the common transactions of life they pass by delivery as cash. When made payable, as in the present case to 'W. Pitt or bearer,' no body supposes that they are payable to a real person, who thereby acquires a real interest in them. It is notorious that such names are fictitious; and the whole objects of the bank would be defeated, if the holder could not entitle himself to recover upon them, without showing an assignment, or delivery from the fictitious person. They pass out of and into the bank a thousand times; and are always understood to be payable to the bearer, whoever for the time being he may be, and to no one else. And even if 'W. Pitt' were a real person in this case, it would not change the nature of the suit; for the note would still be payable to the bearer, although he never claimed by or through 'W. Pitt;' since it is payable in the alternative, and not to 'W. Pitt' absolutely. Even a payment to 'W. Pitt' would be no discharge of it as against a subsequent bearer, *bona fide*, for a valuable consideration; for bank notes payable to bearer, are always deemed good, while they remain in circulation, notwithstanding they have been presented to the bank, and paid by the bank." By the Revised Statutes of New York (vol. 1, 2d ed. p. 757, § 5,) "notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer." It had however been settled long before the statute "that a note made payable to the order of a fictitious person, and negotiated by the maker, might be treated as a note payable to bearer. Notes made payable to the order of the maker are now placed upon the same footing. The statute was made for the purpose of obviating a difficulty in the way of the holder in making title, and suing on a note which had not been endorsed by the person to whose order it was made payable. It applies to cases where the maker, who is also payee, negotiates the note *without endorsement*. Where he transfers by endorsement, there never was any difficulty on the part of the holder, in making title and suing on the note." *Bronson, J. Plets v. Johnson*, 3 Hill, 115. But a promissory note purporting to be payable to a real person, and endorsed in a forged handwriting, resembling and intended to pass for his, cannot be considered as a note payable to a fictitious payee, and so negotiable without being endorsed. *Dana v. Underwood*, 19 Pick. 99.

In *Bennett v. Furnell*, 1 Campb. 130, it was holden, that a bill of exchange made payable to a fictitious person or his order, is neither in effect payable to the order of the drawer, nor to bearer, but is completely void; but if money be paid by the holder of such a bill, as the consideration for its being endorsed to him, and gets into the hands of the acceptor, it may be recovered back as money had and received.

If a bill or note import to be payable to a person not in *esse*, or his order,

er(14)—or endorsed in blank(15)—promissory notes(16)—

and be issued with an endorsement in blank purporting to be made by him thereon, it is, as against the drawer or maker, to be considered as a bill or note payable to bearer ; and so is a bill as against the acceptor, if he *knew* at the time of the acceptance, that the payee was a fictitious person ; but if the holder, being cognizant that the payee was a fictitious person, discounted the bill for the drawer, he cannot afterwards recover on it against the acceptor. *Hunter v. Jeffery*, Peake's Add. Cas. 146. So, where a bill is drawn in the name of a fictitious person payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer. Lord Tenterden, C. J. "The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it ; but it is said that he may, nevertheless dispute the endorsement. Where the drawer is a real person he may do so ; but if there is in reality no such person, I think the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed for the drawer." Bayley, J. "The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawers. If they chose to accept without making the inquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills." *Cooper v. Meyer*, 10 Barn. & Cress. 468. And see *Canal Bank v. Bank of Albany*, 1 Hill, 287, 289. ||

(14) † *Grant v. Vaughan*, 3 Burr. 1516. † || A check upon a bank is substantially the same as an inland bill of exchange ; and the rules applicable to the one are generally applicable to the other. *Cruger v. Armstrong*, 3 Johns. Cas. 5. But though there is a strong resemblance, yet there is not an absolute identity. "In many cases," says Mr. Justice Story, "they are identical in their legal results ; but by no means in all. Mr. Chitty very properly says that a check *nearly* resembles a bill of exchange ; but (he adds) it is uniformly made payable to bearer, and should be drawn upon a banker, or a person acting as such. (Chitty on Bills, 8th ed. ch. 11, p. 545.) I agree, that it nearly resembles a bill of exchange ; but *nullum simile est idem*. It is commonly, although not always, made payable to the bearer ; but I conceive it to be still a check, if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually also, made payable on demand ; although I am not aware that this is an essential requisite. The distinguishing characteristics of checks as contra-distinguished from bills of exchange, are, (as it seems to me,) that they are always drawn on a bank or bankers ; that they are payable immediately on presentment, without the allowance of any days of grace ; and that they are never presentable for mere acceptance ; but only for payment." *In the matter of Brown*, 2 Story's Rep. 512. It is said by Nelson, C. J. in *Woodruff v. The Merchants Bank of the City of New York*, 25 Wend. 675, that "it is essential to a check, *eo nomine*, or bank draft, that it be payable to *bearer*, and on *demand*." Neither of these requi-

sites, as we have just seen, have been deemed essential by Mr. Justice Story: and as to the necessity of a check being made payable to bearer, in order to render it distinguishable from a bill of exchange, it is believed that the uniform usage is directly the reverse, and that it is of every day occurrence to draw checks payable to order, which the payee may endorse in blank, and thus make them negotiable to the same extent as if originally drawn payable to bearer, or may restrict their negotiability by a special endorsement. "The truth is," says Mr. Justice Johnson, in *Mechanics Bank of Alexandria v. The Bank of Columbia*, 5 Wheat. 326, "that a check is properly neither a bond, bill, or note, *with regard to the bank drawn upon*, but an acquittance. And the contract arising out of a payment upon it, is a contract for money advanced and must be so declared upon. It is true that checks are generally made payable to bearer, and *this was made payable to order*; but it is in evidence that it was drawn as a check and paid as a check, &c." See further *Little v. The Phoenix Bank*, 2 Hill, 425; *Herker v. Anderson*, 21 Wend. 372; *Conroy v. Warren*, 3 Johns. Cas. 259; *Walker v. Geisse*, 4 Wharton's (Penn.) Rep. 252; 3 Kent's Comm. 104, n. (a)

A bill, note, or check payable simply to bearer, without the insertion of any name real or fictitious, is clearly valid in the hands of a *bona fide* holder. 3 Kent's Comm. 78. We have seen that a negotiable instrument with a fictitious payee, is binding upon the maker or drawer; (ante, n. 13,) and, *a fortiori*, the omission of a name should not make any difference.

It is no objection to the validity of a bill of exchange, that the acceptance and endorsement were written before the bill was drawn, notwithstanding the endorsement was made by a stranger to the acceptor. *Schultz v. Astley*, 2 Bingh. N. C. 544. And see *Putnam v. Sullivan*, 4 Mass. Rep. 45. A blank endorsement upon a blank piece of paper, with intent to give a person credit, is in effect a letter of credit; and if a promissory note be afterward written upon the paper, the endorser cannot object that the note was written after the endorsement. *Violett v. Patton*, 5 Cranch, 142.

When a check or promissory note payable on demand should be presented for payment, so as to obviate the objection of having been negotiated when overdue, see *Brooks v. Mitchell*, 9 Mees. & Wels. 14, where the distinction between checks and notes payable on demand is taken. The American cases on the subject are collected by the American editors. *Ibid.*, 17, note.¶

(15) † *Collins v. Martin*, 1 Bos. & Pull. 649; *Peacock v. Rhodes*, Doug. 636.†

(16) † *Ibid.* † ¶ A note *under seal*, for the payment of money, though in all other respects like a promissory note, is not negotiable. *Clark v. The Farmers Woollen Manufacturing Company of Benton*, 15 Wend. 256; *Treval v. Fitch*, 5 Wharton's (Penn.) Rep. 325. A promissory note made payable to the order of the person who should thereafter endorse the same, is negotiable. *The United States v. White*, 2 Hill, 59. And a guaranty, endorsed upon a negotiable instrument, if such guaranty be in terms negotiable, has been treated as a negotiable instrument. *Ketchell v. Burns*, 24

exchequer bills in blank(17)—and it should seem navy bills also.(18) But East India bonds (which can only be put in suit by the original obligee,) however by usage transferrible, are not in law negotiable.(19)

The negotiability of English mercantile instruments is to be decided by the court,(20) but it *seems [*235]

Wend. 456. A general guaranty in the words "I hereby guarantee the payment of a note made by, &c." without naming any person as the party guaranteed is a valid instrument, and may be enforced by any one who advances money upon it; but it is not negotiable, so that an action may be brought upon it in the name of any other person than of him in whose hands it first became available, unless written upon the note, or at least annexed to it; "in the nature" to use the words of Walworth, Ch., in the case now cited, "of an *allonge*, or ekeing out of the paper upon which the note is written;"—in which case it may be treated as an endorsement, having the quality of negotiability, with the further benefit of a waiver of demand and notice. *Watson's Ex'rs v. McLaren*, 19 Wend. 557; *McLaren v. Watson's Ex'rs*, (in error,) 26 Wend. 425. Among some of the continental nations of Europe there is a species of guaranty, (called in French, *aval*, and by the German Civilians, *avallum*,) of the payment of a negotiable instrument, which seems to possess a distinct negotiability. See the remarks and citations of the learned judges of the Court of Errors, in the case last noticed. It is not sufficient to render a guaranty negotiable, that it be written upon a negotiable paper; it must contain words of negotiability in itself. *True v. Fuller*, 21 Pick. 140. In what cases an endorsement may be converted into a guaranty, see *Dean v. Hall*, 17 Wend. 214; *Lamourieux v. Hewit*, 5 Wend. 307; *Seabury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 3 Hill, 233; *Taylor v. Binney*, 7 Mass. Rep. 479.

The endorser of a note payable to bearer, renders himself liable as endorser, in the same manner as if the note were payable to order. *Brush v. The Adm'rs of Reeves*, 3 Johns. Rep. 439; *Dean v. Hall*, 17 Wend. 216. Although a note may not be in form negotiable, yet the payee may make it so by endorsing it payable to order, after which it becomes, as between the endorser, (but not the maker,) and the holder, an inland bill of exchange, in which the endorser stands in the light of a new drawer of a bill payable to the order of the endorsee. *Brenzer v. Wightman*, 7 Watts & Serg. 264.]]

(17) + *Wookey v. Pole*, 4 B. & Ald. 1. + || But see the note of the reporters, 6 Mann. & Gr. 647.]]

(18) + *Goldsmid v. Gaden*, cited in *Collins v. Martin* + || Ante, n. (p).]]

(19) + *Glynn v. Baker*, 13 East, 509. + || They have since been made negotiable by statute. A letter of credit, or other commercial guaranty, is not a negotiable instrument. Bronson, J. *Birckhead v. Brown*, 5 Hill, 646.]]

(20) + *Grant v. Vaughan*, ante. + || n. 14.]]

from a recent case, that the question as regards foreign instruments must be determined on evidence by the jury.^(A) The question arose out of a fraudulent pledge

(A) ¶ The negotiability of a foreign instrument depends on the law of the place where it was concocted, made payable, and negotiated. Hence it was held, that as by the law of France an endorsement in blank does not transfer any property in a bill of exchange, the holder of a bill drawn in France, and endorsed there in blank, cannot recover against the acceptor in the English courts. *Trimbey v. Vignier*, 1 Bingh. N. C. 151. But where a note negotiable in its form was drawn in a place where such notes were not negotiable, and was afterward negotiated in the state of New York, by an endorsement recognized by the law of that state, the holder was held entitled to maintain an action, there, against the maker. *Lodge v. Phelps*, 1 Johns. Cas. 133; S. C. 2 Caines' Cas. in Err. 321; and see Story's Conflict of Laws, §§ 353, 353, a. 354, 357, 359; *Thompson v. Ketcham*, 4 Johns. Rep. 285; S. C. 8 Johns. Rep. 189. When, therefore, the negotiability of the instrument depends upon the *lex loci contractus*, the foreign law must be proved as a matter of evidence, of which the court cannot judicially take notice, to be produced either to the court, or to the jury, according to the mode of proceeding of the tribunal in which the cause is pending. Where the case depends upon the written law of another country, a properly authenticated copy of the statute should be produced; but unwritten or common law may be proved by witnesses;—not such as may be picked up at random—but advocates, or jurists; such persons as whose studies and pursuits would entitle their opinion to weight. *Brush v. Wilkins*, 4 Johns. Ch. Rep. 520; *Trimbey v. Vignier*, ubi supra; S. C. 6 Carr. & P. 25; *Hill v. Reardon*, Jac. 90; *Bernal v. Bernal*, 3 Myl. & Cr. 559, n. (a); *In the Matter of Robert's Will*, 8 Paige, 446; *Williams v. Williams*, 3 Beav. 547; *Lincoln v. Battelle*, 6 Wend. 475, 482, 483, 484. Messrs Carington & Kirwan in the index to the first volume of their *Nisi Prius Reports*, refer to a case, "The Sussex Peerage," as at page 213 of their volume, no such case is to be found at the page cited, nor elsewhere in the book; and the editor is unable to explain how it crept in. But as the positions there stated are so apposite to the subject of the present note, and so readily command our assent, that the editor does not hesitate to insert the passage as he finds it. "1. A witness to prove foreign law must be a person *peritus virtute officii*, or *virtute professionis*. 2. A Roman Catholic Bishop holding in this country the office of a coadjutor to a vicar apostolic, and as such authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. 3. A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence."

But when the statute of another state, or of a foreign country is proved

by a broker of certain *bordereaux* and *coupons*, entitling the holder to dividends in Neapolitan stock. These documents contained on the face of them a reference to certain certificates, which alone could convey a title to the principal stock, although on presenting the *bordereaux*, *coupons* might always be obtained for the dividends. In the present case, the certificates had not been pledged with the other documents, and Tindal, C. J., left it as one question for the jury, whether the *bordereaux* and *coupons* without the certificates were negotiable in the English market by delivery alone, which the jury answered in the negative. On a subsequent argument upon the propriety of this direction, the whole court were of opinion that the Chief Justice was right.(21)

In a previous case, where an agent had improperly pledged a Prussian bond of his principal, by which bond the King of Prussia declared himself and his successors bound *to every person who should for the time being be the holder of the bond*, for the payment of the principal and interest, evidence was given that such instruments were *commonly negotiable in the English [*236] market by delivery alone, and the jury having found

and made evidence, with whom does its construction rest? with the court, or with the jury? In *Holman v. King*, 7 Metcalf, 384, the Supreme Court of Massachusetts held that the construction of a statute of the state of Georgia was a matter of fact for the jury. In other words—that it is competent for a jury to determine the construction of a written instrument.||

(21) † *Lang v. Smyth*, 7 Bing. 284. † || As the meaning of the terms *bordereau*, and *coupon*, are not explained in the text, it may be convenient for the reader to state their signification as derived from the case referred to. The *bordereau* was an obligation, or *certificat de rente*, issued by the Neapolitan Government, for the purpose of raising money. On the same sheet as the *bordereau*, fourteen *coupons*, or receipts for half yearly payments of interest, for fourteen half years successively from the date of the *bordereau*, were set out in succession. One of them was cut off, (*couper*, to cut, an obvious etymology,) and given up to the Neapolitan Government upon the receipt of each half yearly payment, and when the whole fourteen were exhausted, upon the production of the *bordereau* at the head of them, the holder received a new *bordereau* with fourteen new *coupons*.||

a verdict in favor of the holder, the Court of King's Bench refused to disturb it.(22)

Instruments which are ordinarily negotiable, may have their currency restricted by the act of the holder.(A) A bank post bill cannot be circulated without the endorsement of the payee, and a bill of exchange may by a particular direction upon the bill, be limited to special purposes; in which case the party taking it from the next immediate holder, whether by way of pledge or upon discount, takes it subject to the uses so declared, and is accountable to the person by whom it was restricted, in case of any misapplication of the proceeds.

Two cases, both of considerable importance, will illustrate this proposition. Two bills of exchange were paid to De Roure, the agent of Messrs. Treuttell & Wurtz, endorsed as follows: "Pay to J. P. De Roure, Esq., or order, for account of Messrs. Treuttell & Wurtz." These bills were deposited by the agent of Barandon & Co., as a security for past and future advances made by them to him, and on the bankruptcy of the agent were claimed by Messrs. Treuttell & Wurtz. An action having [*237] been brought to enforce the *claim, the court decided that by the form of the endorsement the negotiability was restricted, and that Barandon & Co. could not withhold the bills from Treuttell & Wurtz, whose property they must have known them to be.(23)

The other case was as follows:—A foreign bill was transmitted by the principal in America to his factor in England, thus endorsed: "Pay Samuel Williams, or order, for my use." This bill the agent discounted with Jones, Loyd & Co., bankers in London, and misapplied the pro-

(22) † *Gorgier v. Mieville*, 3 B. & C. 45.‡ || S. C. 4 Dowl. & Ry. 641.||

‡It does not, however, appear in this case that the court treated the negotiability as other than a question *for the court*.‡ || And see *Clark v. The Farmers Woollen Manufacturing Co.* 15 Wend. 256, 259; note of the reporters, 6 Mann. & Gr. 647.||

(A) || *Rice v. Stearns*, 3 Mass. Rep. 226.||

(23) † *Treuttell v. Barandon*, 8 Taunt. 100.‡

ceeds, whereupon the principal sued the bankers for money had and received to his use. The case underwent considerable discussion both in the King's Bench, where the action was originally brought, and afterwards in the Exchequer Chamber, into which court it was carried on appeal. And the judges were unanimously of opinion, that the plaintiff ought to recover, inasmuch as by the operation of the restrictive words, "to my use," the bill could not be negotiated without imposing on the next immediate holder the responsibility of seeing that the proceeds were properly applied; and they held that the words "or order," although apparently giving to the endorsee the right to negotiate, were not sufficient to control the manifest intention indicated by the other expression.(24)†

(24) † *Sigourney v. Loyd*, 8 B. & C. 622; *Dan. & Lloyd*, 132; *Loyd v. Sigourney*, 5 Bing. 525. ‡ So, in another case in which a bill was endorsed, "Pay the amount to order *for my use*." Washington, J. said: "What is the nature of such a special endorsement as the present? It prevents the negotiability of the bill, and amounts to a declaration, that in case the bill is protested, no damages are to be recovered. The money is to be received for the use of the endorser; but how it is to be applied is a matter between the endorser and endorsee. If the endorsee be not a creditor, then he is to receive the money and remit it; or if the bill be dishonored, he is to return it. If he be a creditor, then of course he is to apply the money to the credit of the endorser." *Brown v. Jackson*, 1 Wash. C. C. Rep. 515. As to a special endorsement for the purpose merely of giving the paper negotiability, without making the endorser personally responsible; see *Mott v. Hicks*, 1 Cowen, 514, 538; *Russell v. Ball*, 2 Johns. Rep. 50; *Rice v. Stearns*, 3 Mass. Rep. 224. In the case last cited, Parsons, C. J. says: "The case at bar is a restricted endorsement which in practice is very common. The promisee of a negotiable note endorses it to a third person, or his order, for value received, stipulating that the endorser is not to be responsible, if the maker does not pay it.—Upon consideration we are of opinion, that the promisee, endorsing the note under this express stipulation, is not eventually holden to pay the note, if the maker should not. As the promisee had the property of the note, he might dispose of it on what terms he pleased, with the assent of the purchaser, and the latter cannot complain of the necessary effect of his own agreement: and the endorser cannot be charged upon his own contract, directly against the express intent of it.—Another point of some importance arises, which involves the question, whether by this restricted endorsement the property of the note passed to the endorsee, so that he may sue upon it in his own name. If the restriction applied to the

[*238] *And the negotiability even of money or notes does not prevent their being followed in cases of fraud to which the receiver is a party, provided they can be traced.(u)(25)

‡ Nor even where there has been no-fraud, if due caution has not been exercised in the taking of the instrument. For it is now well settled, that if bills, checks or notes, are taken under circumstances which were calculated to excite a reasonable suspicion that the holder could not honestly dispose of them, the party so taking them cannot hold them against the person really entitled.

Thus without adverting to many other decisions
[+239] by which this position is established,(26) in the *case beforementioned of *Smyth v. Lang*, one of the questions left to the jury was this : whether the defendant

quality of the contract, so as to render a negotiable security no longer negotiable, there would be some difficulty in allowing, consistently with legal principles, an endorsement of this effect to operate as a transfer of the note. But this is not the effect of the restriction : the note remains negotiable in the hands of the endorsee, although he has no remedy against the endorser ; and in whose hands soever the note may come, the maker is still liable according to the terms of his original contract to pay to the promisee or his order.”¶

(u) Lottery tickets are not within the exception in favor of negotiable instruments, and therefore where a lottery ticket was deposited by A. with a banker to receive the money upon it, and was delivered by him to B. instead of his own, A. recovered against B. in an action of trover for the ticket. *Ford v. Hopkins*, 1 Salk. 284. See the observations made upon this case by Lord Mansfield, 1 Burr. 452. See *Turner v. Cruikshank*, cited Ambler 187. A subscription receipt in South-Sea Stock for 1000*l.* was delivered by the plaintiff, with whom it had been deposited, to another person, by mistake for one of the same value, and the defendants recovered in trover against the plaintiff, who filed a bill for relief, which was first denied by the Master of the Rolls, but granted by Lord Macclesfield. ‡ And see *Glynn v. Baker*, 15 East, 509.‡

(25) *Solomons v. Bank of England*, 13 East, 135, n ;‡ || ante, 233, n. (A).||

(26) ‡ *Gill v. Cubitt*, 3 B. & C. 466 ; *Snow v. Peacock*, 3 Bing. 408 ;‡ || S. C. 2 Carr. & P. 215 ;|| ‡ *Down v. Halling*, 4 B. & C. 330 ;‡ || S. C. 2 Carr. & P. 11 ;|| ‡ *Slater v. West*, Dan. & Lloyd, 15 ; and see the note.‡ || S. C. 3 Carr. & P. 325 ;|| ‡ *Strange v. Wigney*, 6 Bing. 677 ; *Lloyd & Welsby*, 337 ;‡ || *Stafford v. Wyckoff*, 4 Hill, 442 ; ante, 119, n. (t).||

had acted with proper caution in taking the *bordereaux* without requiring the certificates to which they referred ; and the jury having found in the negative, the other judges, before whom the case was afterwards brought, were of opinion, that the circumstance of the *bordereaux* and *coupons* being separately pledged, was a circumstance which, with a careful man, ought to have excited inquiry, and that the direction in this respect also was right.(27)†

(27) † 7 Bingh. 284.† || Where R. having as agent of B. received negotiable notes to be remitted to B. delivered them to C. as security against responsibilities assumed by him, as endorser of the notes of R. and maker of the notes lent R. for his accommodation, but not then payable, and R. had stopped payment and become insolvent, it was held that though C. had no knowledge that the notes so deposited with him belonged to B. but believed R. to be the true owner of them, yet the notes not being received in the usual course of trade, nor for a present consideration, he was not entitled to hold them against C. the true owner. *Coddington v. Bay*, 20 Johns. Rep. 637 ; S. C. 5 Johns. Ch. Rep. 54 ; ante, 233, n. (A.) In an action by the endorsee of a bill who has given value, if his title be disputed on the ground that his endorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the endorsee acted with good faith in taking the bill, not whether he was guilty of gross negligence. On the trial of the case now referred to, it appeared that the bill on which the suit was founded had been noted for non-acceptance and protested, and was taken by the plaintiff with the notarial marks upon it ; and Lord Denman before whom the cause was tried, observed “ that the plaintiff had received the bill with a death wound apparent on it.” The plaintiff having been nonsuited, a new trial was granted, on the motion for which, the Chief Justice, Lord Denman, observed : “ The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion, that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in good faith.” *Goodman v. Harvey*, 4 Ad. & Ell. 870. “ Acting upon the case of *Goodman v. Harvey*, which gives the law now prevailing on this subject, we must hold, that the holder of a bill is entitled to recover upon it, if he has come by it honestly ; that that fact is implied *prima facie* by possession ; and that to meet the inference so raised, fraud, felony, or some such matter must be proved.” Lord Denman, *C. J. Arbouin v. Anderson*,

3. If a factor have an absolute power to sell, an endorsement of a bill of lading by him while the ship is at sea, provided it be by way of sale, and not of pledge, passes the property, and divests the principal's right to stop *in transitu*.^(x) And in the absence of fraud it seems that the as-

1 Ad & Ell. N. S. 503. See further, *Bristol v. Sprague*, 8 Wend. 423; *De la Chaumette v. The Bank of England*, 2 Barn. & Cr. 208; *Long v. Bailie*, 2 Campb. 214, n.; 1 Steph. N. P. 857.¶

(x) Per Lord Mansfield, *Wright v. Campbell*, Burr. 2051. This appears to have been taken for granted in the case of *Newsom v. Thornton*, 6 East, 41. In the case of *Hunter v. Baring*, also cited 6 East, 39, the same doctrine seems to have been held by Lord Kenyon; and see *Dick v. Lumsden*, Peake, N. P. 190. ¶ If a consignee assign the bill of lading to a third person for a valuable consideration, and the latter receive it *bona fide*, without notice of any circumstances which may render the bill of lading not fairly and honestly assignable, the right of the consignor as against such assignee is divested, for a bill of lading, so endorsed, transfers the property. *Lickbarrow v. Mason*, 2 Term Rep. 63; S. C. 1 H. Black. 357; 5 Term Rep. 347, 683; 6 East, 17, note. (For the history of this celebrated case, see 2 Kent's Comm. 548.) But where a bill of lading was assigned by the vendee to his factor, it was held that the right of stoppage *in transitu* was not divested, although he may have drawn upon him to the amount of the consignment, it not being intended that the goods in question should be appropriated to the payment of the particular bills, and the goods not having reached the factor's hands, and no specific pledge having been made. *Patten v. Thompson*, 5 Maule & Selw. 350.

The bill of lading purported on its face to be a shipment by E. T. of seven kegs containing 21,000 dollars, for account and risk of the shipper; to be delivered at Canton to J. R. T. or his assigns. Story, J. "By the well settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his endorsement of the bill of lading to a *bona fide* purchaser for a valuable consideration, without notice of any adverse interests, the latter becomes as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by endorsement, and thus may pass the property. It matters not whether the consignee, in such case, be the buyer of the goods, or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner, and vesting it in the endorsee of the bill of lading. And, strictly speaking, no person but such consignee can, by an endorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere endorsement of the bill of lading, unless he be the con-

signee's knowledge of the factor's character would not affect his title; for, in order to make notice material, it must be notice of something inconsistent with the right of the assignor to do the act under which the assignee claims, or of such circumstances as render the bill of lading not fairly and *honestly assignable :(y) but inas- [*240] much as the character of a factor is consistent with the power to sell, the knowledge of this circumstance would not probably be considered as any impeachment of the transaction, if it would be otherwise valid.

In order to empower a factor to sell goods consigned to him, he is usually furnished with a bill of lading endorsed to him by the consignor, and this is the only regular transfer ;(27) but a letter of advice may be sufficient against a

signee, or what is the same thing, it be deliverable to his order; yet by any assignment either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an endorsement of the bill of lading itself. Such an assignment, not only passes the legal title as against his agents and factors, but also against his creditors in favor of the assignee.—In the present case, E. T. was the owner of the goods, and the consignee was merely his factor. He therefore had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading by a suitable instrument of assignment and sale against any body, but a purchaser without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition." *Conard v. The Atlantic Ins. Co.*, 1 Peters, 386, 447. As to the negotiability of a bill of lading, and the effect of an assignment or endorsement thereof, see further *Lickbarrow v. Mason*, ubi supra; *Nathan v. Giles*, 5 Taunt. 558; *Morison v. Gray*, 2 Bingh. 260; *In the Matter of Westzintus*, 5 Barn. & Ad. 817; *Berkley v. Watling*, 7 Ad. & Ell. 29; *Chandler v. Belden*, 18 Johns. Rep. 157; *Saltus v. Everett*, 20 Wend. 272; *Walter v. Ross*, 2 Wash. C. C. Rep. 283; 2 Kent's Comm. 548, 549, 550; ante, 215, n. (g); post, 241, n. (x).||

(y) *Cumming v. Brown*, 9 East, 516.

(27) † Whether the mere endorsement of the bill of lading by a principal to his factor will transfer the *property* in the goods is very doubtful. As regards third parties, who take by assignment from the endorsee *bona fide* and in a transaction of sale, it will, no doubt, have this effect; but it has been made a question, whether the factor can, by virtue of the assignment, maintain an action of *trover* (which implies a right of *property*) against one

party privy to the whole transaction. As where the owner of goods consigned them to his factor for sale, and also a bill of lading *not endorsed*. Afterwards, when he was informed by the factor of the want of an endorsement, he answered by letter that it was a mistake, and he would send an endorsement, upon which the factor sold the goods; but not being able to take up the bills drawn upon him

by the owner, the latter sent the endorsed bill to [*241] another person who had paid the bills for "the honor of the drawer, with full knowledge of all the transaction. In an action brought by him against the purchasers, Lord Kenyon declared, that though amongst persons ignorant of the circumstances, an endorsement is the only transfer, yet that a letter of advice was sufficient where the parties knew all the circumstances, and the plaintiff was therefore nonsuited.(z)

4. A factor whose employment requires him to transmit goods to his principal in a foreign country, has power to bind those goods for the freight.(A) The rule, as stated by Molloy, is, If a factor enter into a charter-party with a master for freightment, the contract obliges him;(B) but

who has wrongfully got possession of the goods. *Coxe v. Harden*, 4 East, 241.†

(z) *Dick v. Lumden*, Peake, N. P. 189. † But in general the transfer by a factor of an *unendorsed* bill of lading, even on a *bona fide* sale, will not pass the property. *Nix v. Olive*, Abbott on Shipp. 5 ed. p. 393.‡ || A consignee of goods delivering over to a third person the shipping note of such goods, and a delivery order on the wharfinger, to deliver such goods as soon as they arrive, does not pass the property in them so as to prevent a stoppage *in transitu* by the consignor. Burrough, J. "I think the shipping note does not amount to a bill of lading; a bill of lading is exactly like a bill of exchange, and the property it refers to, passes by endorsement on it, but not by delivery of it without endorsement. I do not think this shipping note, from the nature of it, is endorsible; and here, in point of fact, it is not endorsed; therefore in my judgment, there was no change of property." *Akerman v. Humphery*, 1 Carr. & P. 53.||

(A) || Upon the principle that an authority is to be so construed as to include all necessary or usual means of executing it with effect. *Ante*, 189.||

(B) || For this reason, that by entering into a charter-party, the factor binds himself by an instrument under seal. *Post*, 381, 382.||

if he lade aboard generally, the goods, the principals, and the lading, are made liable, and not the factor, for the freightment.(a) But if a merchant allow a certain sum to the factor for carriage, and the factor on his own account execute a charter-party for the hire of a ship, the merchant or the goods are only liable for the *freight* and not for the whole hire of the ship.(b)

*SECTION 7.

[*242]

How far a joint Employment makes the Employers jointly liable.

It is alleged by Molloy, "that where one and the same factor acts for several merchants in the same transaction, they must run the joint risk of his actions, though they be strangers to each other; as if five merchants remit to one factor five distinct bales of goods, and the factor make one joint sale of them to one man, who is to pay a moiety down, and the other at six months' end; if the vendee break before the second payment, each man must bear an equal share of the loss.(a) However, if such a factor draw a bill

(a) 2 Moll. 331; 2 Atk. 622.

(b) *Paul v. Birch*, 2 Atk. 622.

(a) 2 Moll. 328. ¶ The appointment of a joint agent does not necessarily create a partnership between the different principals. As, where an abandonment was made to a number of separate underwriters on one policy of insurance, who accepted the abandonment, paid the loss, and appointed a common agent to take care of their interests, it was held that they were not answerable jointly for expenses incurred in reference to the subject insured. Thompson, J. "By the acceptance of the abandonment, each underwriter must be deemed interested, individually, and not as a partner, in the proportion which his subscription bears to the value of the subject. Neither can the writing appointing a common agent to manage the subject, have the effect of making the underwriters co-partners. It is not uncommon for different persons to appoint the same agent to transact their business; but it would be a strange conclusion to say, that the principals there-

upon all those five merchants, and one of them accept it, the others are not bound.(b)

It has been decided, that where several persons employ a broker to buy one lot of goods, each being to take an aliquot part, but without any mutual interest in the re-sale, this does not make them partners.(c)

by became joint-partners. In these cases, as well as in the one before us, the common agent must be considered as representing separately, the rights of each individual, according to his interest in the subject." Kent, C. J. "How far are the defendants responsible, in consequence of their share in the ship? They insured *separately*; and the abandonment was made to them separately, because it was made in the capacity in which they stood as insurers. They became owners of an *aliquot* part, in the *ratio* which their separate subscription bore to the whole sum insured; and it required a special agreement between the several insurers to change their separate character and make them joint partners and security for each other. Nothing can be more plain and reasonable, than that the character in which they started, should continue until changed by their act and consent. No such act appears in the present case. They accepted the abandonment in the capacity in which they stood as insurers. Their responsibility as owners was as distinct as their responsibility as insurers. Their uniting in a letter to Mr. H. is no evidence of co-partnership, or that they meant to engage for each other. They united in making the same person agent for all. To make separate underwriters responsible for each other, and to adjudge them partners by mere operation of law, and in consequence of an abandonment which could not be resisted, would be destructive of that species of insurance. It would be manifestly unjust, for no person ought to be bound without his knowledge and assent." *The United Ins. Co. v. Scott*, 1 Johns. Rep. 106; see *Post v. Kimberley*, 9 Johns. Rep. 470; 1 Liv. Pr. & Ag. 88, 91.¶

(b) *Pinckney v. Hall*, Salk. 126; 1 Ld Raym. 175.

(c) *Hoare v. Dawes*, Doug. 356. Although this was not a case between the vendors and vendees, yet the point here stated is that which is considered to be decided by it in *Coope v. Eyre*, 1 H. Bl. 45; see particularly the judgment of Mr. J. Heath in the last case. ¶ So, where a joint agent is employed to make a sale, and to that extent the parties (under the circumstances of the case,) might be deemed partners, it does not follow that such partnership is to be implied in reference to the disposition made by the agent of the proceeds of the sale, and property purchased by him with such proceeds. This appears from the following case. Archer & McConchey, partners, owning three-fourths of a vessel, and Kimberly & Brace, partners, owning the one-fourth, agreed to fit her out on a voyage from New York to Lagaira. Archer & McConchey supplied three-fourths of

the cargo ; and Kimberly & Brace the other fourth, but which was not distinguished from the rest of the cargo by any particular marks ; and the whole cargo was to be sold at Laguira for the joint account and benefit of the owners. McConchey one of the firm of Archer & McConchey, went out as supercargo and agent for the concerned ; and having sold the cargo at Laguira, invested the proceeds in a return cargo, with which the vessel set sail for New York, but was obliged by stress of weather to put into Norfolk, where the supercargo sold the return cargo, except a small parcel of coffee, and for the avails received bills of exchange which he endorsed and remitted with the parcel of coffee to Post & Russell, to whom the firm of Archer & McConchey, and McConchey individually, were indebted. Post & Russell had notice of the interest of Kimberly & Brace in the shipment. The latter filed a bill for an account, against Post & Russell, who it appears had received the entire proceeds of the sale, and a decree was rendered in their favor for one-fourth of the net proceeds of the return cargo. Post & Russell having appealed, the decree was affirmed by the Court of Errors ; and it was held that there was no agreement constituting a partnership in the purchase of the outward cargo, or to share jointly in the ultimate profit and loss of the adventure ; though there might be a partnership so far as respected the transportation and selling of the outward cargo ; yet it terminated with the sale of the outward cargo, and their interest in the return cargo was separate and distinct, each being entitled to his respective proportion of it, without any concern in the profit or loss which might ultimately arise. Kent, C. J. in delivering his opinion for the affirmance of the decree says : " Because the sale was to be joint at Laguira, (and that is the only thing that looks like a partnership in the whole case,) it does not follow that the subsequent sale was to be joint. As the separate shares in the outfit were held by them as tenants in common, the sale of that cargo was necessarily joint ; and so it is if several persons send their wheat together in one sloop to market, with directions to the captain to sell it for the benefit of each : but their respective proportions of interest in the proceeds, have never been considered as liable for each other's debts." *Post v. Kimberly*, 9 Johns. Rep. 470, 503 ; and see *Holmes v. United States Ins. Co.*, 2 Johns. Cas. 329. That a joint ownership or interest in property does not necessarily constitute a partnership, see further, *Lawrence v. Dale*, 3 Johns. Ch. Rep. 23 ; *Livingston v. Lynch*, 4 Johns. Ch. Rep. 573 ; *Mumford v. Nicholl*, 20 Johns. Rep. 611 ; *Porter v. McClure*, 15 Wend. 187 ; *Rice v. Austin*, 17 Mass. Rep. 206.||

SECTION 8.

Principal how discharged.

1. Where credit has been properly given to an agent on a purchase for the use of the principal, the vendor has in general a right to come upon the latter for payment, without regard to any transaction or account between the principal and the agent. Therefore, no private agreement, by which it is stipulated between the principal and agent that the latter only is to be answerable to the seller, can affect the right of the latter.(A) A covenant by the master of a ship with the owners, that he should be at the cost of the repairs, does not discharge them from their liability for repairs done by his orders.(a) Nor is it any defence to an action against a master for articles sold for his use to a servant, that by agreement with the master the servant for a certain sum contracted to furnish those articles.(b) So that a vendee by paying his own broker does not discharge himself from the demand of the vendor, unless the latter, by giving credit to the broker, induces [induce] the principal to believe that he is released. In an action for goods sold and delivered, the facts were, that the plaintiffs sold the goods to K. & Co., to be taken away in one [*244] month, and paid for in a month *from the sale. K. & Co. were really brokers for the defendant; but that was not known to the plaintiffs till some time after the sale. K. & Co. became insolvent before the expiration of the month, the defendant having previously paid them the price of the goods. It was contended for the defendant, that though in general, upon a sale to a broker, the vendor may come upon the principal when discovered, the doctrine must be taken with this qualification, that the princi-

(A) || Ante, 201 ; *Clark v. The Mayor &c. of Washington*, 12 Wheat. 40.]

(a) *Rich v. Coe*, Cowp. 636.

(b) *Precious v. Able*, 1 Esp. Cas. 350.

pal has not previously paid the price of the goods to the broker. But Lord Ellenborough said, "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is not affected by the state of accounts between the two. If he let the day of payment go by, he may lead the principal into the supposition that he relies solely on the broker; and if in that case the price of the goods have been paid to the broker on account of this deception the principal shall be discharged. But here payment was demanded on the day it became due, and no reason was given the defendant to believe that his broker alone was trusted:" and accordingly a verdict was directed for the plaintiff.(c)

*For the same reasons a principal cannot, under [*245] these circumstances, protect himself by setting up a balance due to him from his own broker.(d)

What is here said does not affect the case of servants to whom money is paid *in advance* to purchase goods with, and who, notwithstanding, are allowed by the sellers to deal upon credit; in such cases, the credit itself being unauthorized by the masters, they are not liable.(e) But it was observed, that if the master justify the credit given to the servant at all, he is not then discharged by paying the price to the servant, if the latter omit to pay it over to the creditor:(f) and the authorities already referred to upon that part of the subject may serve to illustrate the present.

(c) *Kymer v. Suercropp*, 1 Campb. 109. *Speering v. Degrove*, 2 Vern. 643. A. as master of a ship of which the defendants were owners, bought several goods of the plaintiffs. A. failed, and on a bill to compel the defendants to pay, they insisted that A. only was liable, because he had money from the part-owners to pay the plaintiffs; but the court held that A. was but a servant to the owners, and where a servant buys, the master is liable; and though the owners paid their servant, yet if he pay not the creditors, they must stand liable.

(d) *Waring v. Favenc*, 1 Campb. 85.

(e) *Ante*, p. 162.

(f) *Ante*, p. 162, &c.

2. It was before hinted, that in all these cases, where the principal, notwithstanding his having paid his own agent, would remain liable, yet the vendor may, by his conduct in giving credit to the agent, discharge the principal of that liability. Thus, although the owners of a ship be liable for the master's contracts, notwithstanding any private agreement between them by which *the master stipulates that he alone shall be liable, yet if it appear that a tradesman has notice of such an agreement, and in consequence of it gives credit to the master individually, as a responsible person, particular circumstances of that sort may afford a ground to say that he meant to absolve the owners, and to look singly to the personal security of the master.(g)

Thus also, if a vendor neglect to call upon the principal till long after the credit expires, the principal may have a right to suppose, either that the money is paid over by the agent, or that the creditor takes him for his debtor.(h)

‡ Indeed there are several ways in which the liability of the principal may be affected in purchases made by his agent, of which the following summary may be useful.(A)

1st. The purchase may be made by the broker(B) expressly for and in the name of his principal. In that case if the principal be debited by the seller, he only, and not the broker, will be liable.(1)

(g) Per Lord Mansfield, *Rich v. Coe*, Cowp. 637 ; § *James v. Birby*, 11 Mass. Rep. 36, 37.¶

(h) Per Lord Ellenborough, ante, p. 244, 245 ; see *Kendall v Andrews*, 1 Esp. N. P. 115 ; *Stubbing v. Heintz*, Peake, N. P. 46 ; ante, § 165.¶

(A) ¶ Speaking of the six following positions, Mr. Justice Story says, "these distinctions are laid down with great clearness and accuracy :—" and he has inserted them in full in a note. Story's Ag. § 291.¶

(B) ¶ It can hardly be necessary to suggest to the reader, that although the term *broker* is alone employed by Mr. Lloyd in the passages, which he has, in this place introduced into the text of the original work, the principles stated are not restricted in their application, to that particular class of factors or agents.¶

(1) ‡ *Kymer v. Suercropp*, *Waring v. Favenc*, ante, § 244, 245,¶ and the proposition is assumed in all the later cases. It would have seemed un-

*2d. A broker may purchase in his character of [*247] broker for a known principal; but the seller may choose nevertheless to take him for his debtor rather than the principal, in whose credit he may not have the same confidence; and after this deliberate election, the seller cannot afterwards turn round and charge the principal.(2)

3d. The broker may buy in his own name without disclosing his principal, in which case the invoices will of course be made out to him, and he will be debited with the account. If now, before payment, the seller discover that the purchase was in fact made for another, he may, at his choice, look for payment either to the broker or the principal—to the former upon his personal contract—to the latter upon the contract of his agent; and the adoption of the purchase by the principal will be evidence of the agent's authority.(3)

necessary to add, had it not been the subject of a solemn decision, that the conduct of the seller in selecting the agent for his debtor cannot affect the relation of the latter to his principal, nor convert him who was a broker for purchase into a vendor of the goods to the principal. *Seymour v. Pychlau*, 1 B. & Ald. 14.

(2) † *Patterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574. ‡ *Tiernan v. Andrews*, 4 Wash. C. C. Rep. 567. An election deliberately made, with knowledge of facts and the absence of fraud is conclusive; and the party who has once elected, can claim no right to make a second choice. There is no difference in this respect between the rules pursued by courts of law, and equity.¶

(3) † *Railton v. Hodgson*, 4 Taunt. 576, n. Neither can the principal and agent, by any juggle or contrivance among themselves, release the former from this liability. Ibid. *Wilson v. Hart*, 7 Taunt. 295. ‡ Where an agent, without declaring his principal, purchases goods, the vendor, on discovering the principal, may sue him, though he has debited the agent, and though the principal has remitted money to his agent to discharge the debt. *Nelson v. Powell*, 3 Doug. 410. (And see the valuable note of Mr Roscoe, the editor, *ibid.*) A principal, when discovered, is liable on the contract of his agent, where goods are bought by an agent, who does not disclose the name of his principal at the time of the purchase. And where the name of the principal is disclosed after the sale, so as to give an action by the vendor against him for the price of the goods sold, the principal may, on his part, maintain an action against the vendor, for a violation of his part of the agreement: as, for instance, a breach of warranty. *Beebee v. Robert*,

But 4th. If after the disclosure of the principal the seller lie by and suffer the principal to settle in account [*248] with his broker for the amount *of the purchase, he cannot afterwards charge the latter, so as to make him a loser, but will be deemed to have elected the broker for his debtor.(4)

And 5th. If the principal be a foreigner, it seems that, by the usage of trade, the credit is to be considered as having been given to the English broker, and that he only, and not the foreign buyer, will be liable. That question however is for the jury.(5)

12 Wend. 413; see further *Muldon v. Whitlock*, 1 Cowen, 290; *Schermerhorn v. Loines*, 7 Johns. Rep. 310; *Pentz v. Stanton*, 10 Wend. 271, 278; *Raymond v. The Proprietors of the Crown and Eagle Mills*, 2 Metcalf, 324.

If the vendor, on a sale made to an agent, take the promissory note of the agent for the amount of the purchase, on failure of payment by the agent, the principal will be equally liable to the vendor, in an action founded upon the original consideration, as if the note had been given by the principal himself. For, as a general rule, the written promise of the debtor is not an extinguishment of the debt, so as to confine the creditor to his remedy under the written instrument; neither is the promissory note of a third person to be deemed a payment, unless accepted as such, at the time of the sale. *A fortiori*, the note of the agent can have no higher efficacy to discharge the principal, than if made by the principal himself. If the entire credit be given to the agent making the note, a distinct question is presented. *Porter v. Talcott*, 1 Cowen, 359; 1 Liv. Pr. & Ag. 207; post, 251, n. 9. So, the taking of the note of an agent at an extended credit, for goods furnished for the benefit of the principal, does not discharge the principal, unless it is affirmatively shown, on his part, that on the supposition that the debt was paid, or the personal responsibility of the agent accepted for it, he dealt differently with the agent than he would have done, had the note not been taken and the extended credit given. *Rathbone v. Tucker*, 15 Wend. 498; *Frisbee v. Larned*, 21 Wend. 252.||

(4) † Ante, † || 246, 247, n. 3; post, 253; *Muldon v. Whitlock*, 1 Cowen, 308.||

(5) † *Addison v. Gandasequi*, and see *Thomson v. Davenport*, 9 B. & C. 78; *Danson & Lloyd*, 278. † || The question alluded to above, to wit, whether the liability of the agent is affected by the circumstance of his being the factor of a foreign, or domestic principal, is touched upon by the author in a subsequent page, (373,) without laying down any express rule upon the subject. And it may be inferred from the language of Mr. Rae-

6th. There is still an intermediate case, where upon a purchase by a broker, the seller knowing that he is acting as

sell, (Fact. & Brok. 82, 248, 288, 289,) that he did not consider that there was any fixed and imperative rule on the subject, but rather, that it was to be referred to the usage of trade. Mr. Livermore, (Pr. & Ag. vol. 2, p. 249,) however, has stated in express terms, that, "there is a sound distinction, between the case of a principal residing in the country where the contract is made, and that of a principal residing abroad. In the latter case, the factor may be sued, because he is on the spot, and his principal being abroad, cannot be reached." Mr. Justice Story, (Agency, § 268,) states in most unequivocal terms, "that the general rule obtains, that agents or factors, acting for merchants resident in a foreign country, are held personally liable upon all contracts made by them for their employers; and this without any distinction, whether they describe themselves in the contract as agents or not. In such cases the ordinary presumption is, that credit is given to the agents or factors; and not only, that credit is given to the agents or factors, but that it is exclusively given to them, to the exoneration of their employers." Then comes the very important qualification:—"Still however this presumption is liable to be rebutted, either by proofs that credit was given to both principal and agent, or to the principal only, or that the usage of trade does not extend to the particular case." Again, (§ 290,) the learned commentator lays down the rule, as he understands it, in even more explicit language. "There are cases in which the presumption of an exclusive credit being given to an agent is so strong, as almost to amount to a conclusive presumption of law. Thus, for example, where a known factor buys or sells goods for his principal who is resident in a foreign country, it will be presumed in the absence of all rebutting circumstances, that credit is given exclusively to the factor in the whole transaction, and that he is dealt with as the principal. This doctrine may be satisfactorily explained in many cases by the consideration that there is no other known responsible principal. But, [and here is an argument to which it would be difficult to withhold one's assent,] it is founded upon a broader ground, namely, upon the presumption, that the party dealing with the agent, intends to trust one who is known to him, and resides in the same country, and is subject to the same laws as himself, rather than to one, who, if known, cannot from his residence in a foreign country be made amenable to those laws, and whose liability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies. *A fortiori*, the doctrine will apply to an agent acting for an unknown principal in a foreign country." And see *id.* § 400, § 448.

The precise point was raised and discussed in the case of *Kirkpatrick v. Stainer*, in the Court of Errors of the State of New York, 22 Wend. 244, on a special report of referees setting forth the evidence adduced before them; in which two able and elaborate, but conflicting opinions, were de-

broker in the transaction, *but not for whom*, makes out the invoice to him, and debits him with the price : can the seller af-

livered by Walworth, Ch., and Verplanck, Senator. The case came up on a writ of error to the Supreme Court, and the judgment of that court, notwithstanding Mr. Justice Story's remark to the contrary, (Agency, § 268, n. 1,) might well be sustained without any recurrence to the topic now under consideration. The question presented in the case is reduced by the manner in which it is handled, to so much of a dry and direct point of law, that we need not trouble ourselves with the facts and circumstances out of which the litigation arose. The opinion of Nelson, C. J. in rendering the judgment of the Supreme Court, was, so far as is material for the present purpose, as follows :—"The case presented, is the ordinary one of a private agent clothed with full authority, acting in behalf of his principal ; not only disclosing it, but actually contracting in his name ; for such is the form of the contract to be extracted from the letters of the 27th and 30th August, 1830. There can be no doubt, a person acting as agent of a foreign house, is not responsible, individually, if he discloses his principal, and acts only in his behalf, any more than an agent of a house in this country. There is no such distinction to be found of any authority in the books, nor is there any reason to support it. If an individual desire the personal credit and liability of the agent, he should make known the fact, and all parties will then understand it ; if the agent declines, the vendor can refuse to deal with him." The decision of the Court below established, that under the particular circumstances of the case, the factor of the foreign principal was not personally liable ; and judgment was rendered for the defendant.

A writ of error having been brought by the plaintiff below, Walworth, Ch. delivering his opinion in favor of the reversal of the judgment of the Supreme Court, says :—"There is no question as to the general rule of law, where an agent or factor who is duly authorized to contract for his principal discloses the fact of his agency, and the name of the person for whom he is acting, that he is not personally liable if he makes the contract in such form as to be binding upon his principal, unless it satisfactorily appear, that he also intended to bind himself personally. The general rule on this subject is not questioned by the counsel for the plaintiff in error ; but he insists, in the *first* place, that the fact that D. T. & Co. were foreigners, residing at Trieste, in the Austrian German territories, takes the case out of the general rule, and renders the agent personally liable ; and *secondly*, that the form of the contract was not such as to make it binding upon the defendant's foreign correspondents—or, at least, that it appears from the contract itself, that it was the understanding of the parties that the defendant was to be personally liable for the performance thereof. These two questions I shall therefore proceed to consider ; for we have nothing to do with the question of fact, &c. &c.—The Chief Justice was evidently under a mistake in supposing that there was no distinction to be found in any books of authority be-

terwards, when the name of the principal is made known to him, substitute him as the debtor and call upon him for pay-

tween the liability of an agent who contracts for a foreign house, and one who contracts for a person residing in the same country where the contract is made, and where such agent is domiciled; and he certainly would not, notwithstanding the multiplicity of cases which are brought before him for examination and decision, have fallen into that error, or have overlooked the authorities on that point, if the cause had been as fully argued in the court below, as it has been here. The first case I have been able to find on this subject is that of *Gonzales v. Sladen*, referred to by Mr. Justice Buller, as decided at Guildhall in Trinity term, in the first year of Queen Anne, from Sergeant Salkeld's manuscript. Bull. N. P. 130.—The law as there stated is, that where a factor to one *beyond sea* buys or sells goods for the person to whom he is a factor, an action will lie against or for him in his own name, for the credit will be presumed to be given to him in the first case: and in the last the promise will be presumed to be made to him; and the rather so, as it is so much for the benefit of trade." The Chancellor then refers to the case of *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 368, and other reported cases, and to text books, and proceeds; "Upon a careful examination of the law on this subject, I have therefore arrived at the conclusion, that there is a well settled distinction between the personal liability of an agent who contracts for the benefit of a domestic principal, and one who contracts for a principal who is domiciled in a foreign country."—[Thus expressly adopting the principle laid down by Mr. Livermore and Mr. Justice Story.] "I do not think that by our commercial usage, it is applicable to the case of a principal who is domiciled in another state of the union; as the interests of trade do not seem to require it. Besides it does not appear to have been applied in England to the case of a principal residing in Scotland; although in the case of *Thomson v. Davenport*, (post, 249, n. 6,) Lord Tenterden supposed it might have been a proper subject of inquiry for the jury, whether there was not a usage of trade at Liverpool to give the credit to the agent, where the principal resided in Scotland. So far as the law is settled on the subject, however, it only applies to a principal domiciled in a foreign country; or, in the language of the common law, 'beyond the seas.'"—In a concluding paragraph of his opinion the learned Chancellor addresses himself to the point on which the case might have been decided exclusively of other considerations. He says; "In the case under consideration, the contract is not drawn up in due form and signed by both parties. It is drawn up in the form of a letter and an answer thereto, which is a very common mode of making contracts between merchants; and as is frequently the case in making such bargains, where each party uses his own language to express his meaning, their letters, if taken separately, might bear a different construction from what both would if taken together. The only proper way in such a case, in giving a legal construction to the

ment? On the one part it is said, the principal in debiting the broker can have exercised no election, because election

contract, is to take both letters together, without placing any particular reliance on either of them separately. It appears from the letters in this case, that a verbal contract had been made between the parties, and that the object of this correspondence was to put it in writing.—Taking both these letters together therefore, and applying to this agreement the principle, that the credit is presumed to be given to the agent who contracts for the benefit of a foreign merchant, instead of the merchant himself, unless there is something in the terms of the agreement to show that such was not the understanding of the parties, I think the defendant in error was personally liable for the fulfilment of his contract with the plaintiff.”

Verplanck, Senator, who delivered the antagonist opinion says: “I concur with the Supreme Court in their understanding of this negotiation. Taking together the two letters of the parties on which the bargain was concluded, the defendant appears to have acted merely as the known agent of the house at Trieste, for and on account of whom he made the advances, and to whom the goods were consigned. He contracted for the foreign house, and in their name, but made no undertaking for himself. This evidence of the correspondence is supported and confirmed by collateral proof of the general belief and understanding among New York merchants, that the defendant was in business only as the agent of the foreign house. In such dealings it is settled that the principals are alone responsible, unless there be some special circumstance to fix the responsibility upon the agent personally. I do not think that there is any such circumstance in this case; although the fact of the defendant being an agent of a *house abroad*, added to the authority of Judge Story, the reasons he assigns, and the unqualified language he uses as to the liability of factors purchasing for foreign merchants, occasioned at first some doubt in my mind. In his late valuable work on agency Judge Story says, &c. [see § 268 referred to *supra*.] To the same effect a respectable recent English elementary writer speaks thus: “It seems that when a British agent contracts for a foreign principal, the agent is liable.” Smith on Mercantile Law, p. 78. Now, if this be also the doctrine of our own commercial law, it may well be doubted whether the language of the correspondence, though showing Stainer to describe himself in the correspondence as an agent, is yet sufficient, even with the collateral evidence, (conclusive as the whole would be in the case of an agent for a domestic principal,) to rebut such a positive legal presumption, and to prove that credit was given only to the Trieste house, so as to authorize the court to pronounce on the facts submitted to them by the referees, ‘that the defendant was not personally liable upon the agreement.’ But upon examining the several cases cited in support of this rule, I am satisfied that Judge Story has stated the doctrine in too strong and unqualified terms, as if this presumption were a universal inference of law,

implies a preference, and there can be no preference when the principal is unknown. On the other part it is answer-

applicable everywhere. I think, on the contrary, that this is a presumption founded altogether upon usage and the particular course of trade, and arises only, when and where that usage is known or proved to exist ; of course then, that it is not an unvarying legal presumption to be applied to any contract, made anywhere, by a factor or agent representing a person or commercial house in some foreign country. Doubtless there may be such a local usage or understanding controlling all contracts of this sort amongst us, as there is certainly in London, and probably all over England. But unless it be so firmly settled and generally known, that it may be assumed without proof, like any other mercantile mode of business of common and public notoriety, such a usage must be shown before the consequent presumption of the agent's liability and the principal's exoneration can arise. I can find no judicial authority for considering this as a rule of general commercial law, independent of a particular course of trade, unless it be a very cautiously expressed *dictum* of Chief Justice Eyre, giving his own individual opinion on the point, after the case in which it had been raised had been decided by the court upon a very different ground. He there added: ' I am not aware that I have ever concurred in any decision in which it has been held, that if a person describing himself as an agent for another residing abroad, enters into a contract here, he is not personally liable on that contract.' *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 368. In the other cited cases [*Patterson v. Gandasequi*, ante, 247 ; post, 334 ; *Thomson v. Davenport*, post, 249, n. 6,] the rule is placed on the ground I have stated.—To these judicial opinions I add the authority of a late English legal writer, frequently quoted with high approbation by Judge Story. Lloyd in his notes on Paley on Agency, thus mentions the rule, evidently with some doubt as to its extent, and referring it wholly to the usage of trade. [See the passage, *supra*, to which the present note is an appendant.] I therefore infer that the presumption is not one raised by legal reason to be taken notice of, as of course, and applied to such contracts wherever made, but one of special usage, or of local understanding, entering into and thus controlling all contracts unless excluded by express stipulation. If however, the course of trade and of credit is now so fixed and so universally recognized in England, as to have become a rule of presumptive evidence, —a legal inference from known public usage, to be applied without special proof of its existence ; still I cannot regard it as being necessarily a part of our own commercial law. It forms no part of the old common law of England, nor is it deduced from any settled doctrine or principle of that law, otherwise than as a rule of presumptive evidence of intention, growing out of positive and unvarying local commercial usage.—If this presumption be now the law of the English courts, without requiring evidence of usage in every case, it is founded upon admitted general usage and understanding ;

ed, that the seller might have known by simply asking the question, and that the omitting to make the inquiry is

but it is not law deduced from the doctrines of the old common law, or resting upon reasons of natural equity or universal public policy, extrinsic to the local usage of trade, and applicable alike at London and in New York. If such were the case, I should respect the decision of the able and learned men who adorn the English courts; because their decisions carry with them the authority of learning and wisdom, arguing from principles and usages common to their country and our own. If the judges of England have established this as the law of their tribunals, within the last few years, they have done so for reasons and upon former repeated evidence peculiar to the course of trade in England, and not of necessity applicable elsewhere. They have found a usage or course of business so universal, so familiar, as to form a part of every contract on foreign account, without being expressed in words. On this, a legal presumption may have been at length raised, as of course. But if here, we have no such universal unvarying usage, nor any evidence in any particular case of a similar special course of trade, it follows that the legal presumption must fall to the ground. Such a mercantile usage may naturally grow up here, either in the general course of trade, or in any particular branch of distant commerce; and, whenever it becomes so known, or wherever it is proved to exist, it should certainly raise the same presumption with us as in England.—No usage or course of business analogous to that prevalent in England, being notorious or well established by former evidence as existing here, and no proof having been offered to the referees of any special or local usage, or common understanding charging the agent alone, and not his foreign principal, for purchases or contracts made avowedly for such known principal, the case must be governed by the general law as to the contracts of a private agent, clothed with full authority and acting openly in behalf of his principal.” And see 2 Kent’s Comm. 630, n. b.

The case of *Kirkpatrick v. Stainer*, having been decided and published between the publication of the first and second editions of his Commentaries on the Law of Agency, and so much stress having been placed on his opinion—either *pro* or *con*—it might well be presumed that Mr. Justice Story would in his next edition have given particular notice to that case: and he accordingly observes upon it as follows; (§ 268, n. 1.) “In this last case, it seems to have been thought by Mr. Senator Verplanck in the Court of Errors, that the doctrine was stated too strongly in the text of the first edition of this work. I confess myself not satisfied, that there was any error in the original text, which propounds the credit, in case of foreigners, to be an exclusive credit to the agent, as a matter of presumption liable indeed to be rebutted, but still a presumption, which is to prevail in the absence of proof of any usage or contract to the contrary; and the opinion of the learned Chancellor (Walworth,) in the same case, fully sustains the posi-

decisive evidence of a deliberate preference of the broker. The Court of King's Bench has decided that the principal *in such case is *not* discharged, but the [*249] decision has not been considered very satisfactory, and is certainly not implicitly acquiesced in.(6)

tion. The very case before the Court of Errors seems to have proceeded in the court below upon grounds certainly not very satisfactory ; for, assuming the foreign principals, in that case, to have been liable on the contract, it is very difficult to avoid the conclusion that the agent had, by his mode of making the contract, also incurred a personal liability. Indeed the case seems irreconcilable with the doctrine laid down in *Higgins v. Senior*, 8 Mees. & Wels. Rep. 834, 844."

The Supreme Court of Louisiana has adopted the rule laid down by Mr. Justice Story, and held, that agents or factors of merchants residing in a foreign country are personally liable on all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases it is presumed that the credit is given exclusively to them, to the exoneration of their employers ; but this presumption may be rebutted by proof that the credit was given to both, or to the principal only. *The Newcastle Manufacturing Co. v. The Red River Rail Road Co.*, 1 Robinson's (Louisiana) Rep. 145.

In *Taintor v. Prendergast*, 3 Hill, 72, Cowen, J. delivering the opinion of the court says, (without however alluding to *Kirkpatrick v. Stainer*.) "It may be admitted, as was urged in the argument, that whether the principal be considered a foreigner or not, his agent omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend it would be too strong to say, that when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said, when a clear intent is shown, to give an exclusive credit to the agent. I admit that such intent may be inferred from the custom of trade, where the purchaser is known to live in a foreign country. No custom was shown or pretended in the case at bar ; and where the parties reside in different states under the same confederation, this has been held essential to exonerate the principal. (*Thomson v. Davenport*, 9 Barn. & Cress. 78.) It will be seen by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is, where the creditor knows there is a foreign principal, but makes his charge in account against the agent."—The subject of the preceding note must be considered as still left in doubt and uncertainty. And the editor can only add, *non nostrum inter vos tantas componere lites.*||

(6) † *Thomson v. Davenport*, ante, n. (5.) The judgment of Lord Tenterden in this case was as follows :—"The general rule is, that if a person sells goods to another on the supposition that he is dealing with him as a principal, and subsequently discovers that that person is but the agent of

7. It was laid down by Parke, J. in a case which underwent much consideration, that wherever the broker has

another, (the state of account not having been varied in the meantime so as to prejudice the latter,) he may resort to the principal for payment, even though he have previously debited the agent. On the other hand, if at the time of sale the seller knows that the person dealing is not the principal, and *knows who the principal is*, yet selects the agent for his debtor, then, according to the cases of *Patterson v. Gandasequi*, and *Addison v. Gandasequi*, he cannot afterwards have recourse to the principal. The present is a middle case. The plaintiffs below [the sellers] were informed that the purchaser was buying for another. They might indeed have made inquiry who that other was, but, in fact, they did not know the principal. It seems to me therefore that the case falls within the first proposition. There may be another exception ; and it is this : Where an English merchant is buying for a foreigner it is universally understood among commercial men, that credit is given to the English buyer. Here the principal lived at Glasgow ; and it might have been a fair question whether by the usage of Liverpool [where the sale took place,] the credit must be supposed to have been given to the English dealer. But that point was not raised, and no such evidence was given."

¶ Among the dissentients from this decision is Mr. Justice Parke. ¶ It does not appear when, where or how, Mr. Justice Parke was a dissentient from the above decision. The reporters simply state that he "having been concerned as counsel in the cause, gave no opinion." In *assumpsit* for goods sold and delivered to the defendants, a manufacturing corporation, the defence was, that one R. R. was debtor for the goods and not the defendants. Dewey, J. delivering the judgment of the court says : "The authorities are uniform in maintaining the doctrine that when the principal is unknown to the vendor at the time of the sale, he may upon discovering the principal, resort to him, or to the agent with whom he dealt, at his election ; and on the other hand, when the vendor, at the time of the sale, knows the principal, and understands that the buyer is the mere agent of another, and elects to give credit to the agent, making him the debtor, he cannot afterwards resort to the principal—This general principle, it is conceded, was properly stated to the jury in the present case. But it was contended, that if the plaintiffs had at the time of the sale the means of knowing that the goods were purchased on account of the defendants and for their benefit, and yet debited them to the account of R. this should bar the claim of the plaintiffs against the defendants, although they had no actual knowledge who the principal was. Such a principle as is suggested, would present great practical difficulties in its application, and might do great injustice. The question at once arises, to what extent are the means of knowledge to exist, to justify its application ? Is it necessary that the vendor should avail himself of every possible means to learn whether the individual he is deal-

stated to his principal, and the latter has *bona fide* adopted a contract different from that under which the purchase was *actually made, the seller cannot call [*250] upon the principal for payment ; because the seller sues on the contract under which the goods were really sold, and is therefore bound to show that the principal authorized or ratified *that contract*, and not a different one substituted by the broker. And although the court hesitated to adopt this proposition in its full extent, yet they were unanimously of opinion, that if the seller have furnished the broker with the means of so misrepresenting the contract to his principal, and the latter have actually paid the broker according to the terms communicated to him, he will thenceforth be released from all liability to the seller.(7)

ing with be principal or agent? If so, the mere neglect by the vendor to inquire of the person with whom he was actually dealing, whether he was acting as principal or agent, and if agent, the name of the principal, would be, in most cases, not using the means of knowledge which were at hand. We do not understand the rule to be applied with this strictness ; but that on the contrary, there must be actual knowledge on the part of the vendor, of the relation of the parties, and their interest in the matter, to exonerate the principal by giving credit to the agent. If with such knowledge, the vendor chooses to give credit to the agent as his debtor, he discharges the liability of the principal. It is not, however, enough that there might exist circumstances that would, in the minds of some men, have awakened suspicion and led to further inquiries. Nor is it enough, if we adopt the decision in the case of *Thomson v. Davenport*, (ubi supra,) to exonerate an unknown principal, that the agent declared, at the time of the sale, that he was dealing for another, if he did not disclose the name of his principal. That case, while it fully recognizes the general rule already stated—that if one, knowing the name of the principal, elects to credit the agent, he cannot afterwards resort to the principal—denies its application to cases where the name of the principal was unknown, although the fact of the agency of the one dealing with him was disclosed, and the vendor must have been apprized that another party might be made the debtor.—Before the plaintiffs could be required to make their election whether they would look to the agent or the principal, they had a right to know with reasonable certainty, the liability of the newly discovered principal.” *Raymond v. Proprietors of the Crown and Eagle Mills*, 2 Metcalf, 319, 324, 327.||

(7) + *Horsfall v. Fauntleroy*, 10 B. & C. 755 ; *Lloyd & Welsby*, 340.4

8. Payment by the agent will of course discharge the principal. And it is a general principle, that if the creditor voluntarily give an enlarged credit to the agent of the debtor, or adopt a particular mode of payment, whereby the principal is placed in a worse situation than he would otherwise have been, the liability of the original debtor is discharged ;(A) and therefore if a creditor voluntarily and for his own accommodation take a *security* from an agent of the debtor, who afterwards fails, having in his hands funds of his principal adequate to the payment of the demand, he cannot afterwards resort to the [*251] *principal.(8) But if the creditor take the security, not voluntarily and for his own convenience, but because he is unable at the time to procure cash, or if he take it conditionally, and not as absolute payment, or if the principal be in no respect prejudiced by the accommodation afforded to the debtor, then to whatever extent the indulgence may have been carried, the principal will not be released. It seems, in short, that nothing will operate as a discharge to the principal which could not be pleaded as payment, or as accord and satisfaction between the creditor and the agent.(9)†

(A) || Post, 253.||

(8) † *Strong v. Hart*, 6 B. & C. 160 ; *Smith v. Ferrand*, 7 B. & C. 19. In the first of these cases, the captain of a ship had taken a bill from the consignees (agents of the consignors) in payment of the freight, which being afterwards dishonored, the ship-owners sued the consignors. And it was held, that the Chief Justice had properly directed the jury to find for the defendants, if they thought that the captain took the bill voluntarily, and for his own convenience, without insisting upon payment in cash ; and for the plaintiffs, if they thought that the captain took the bill, because he could not obtain payment in cash. In the other case, the seller of goods received from the purchaser an order on his banker for the price, deducting six months' discount, and the latter, with whom money had been deposited to meet that and certain other demands, offered to pay in cash, deducting the six months' discount, or, in part, by a bill upon a third person at three months, which the seller elected to take ; and the bill being afterwards dishonored, it was held that he could not sue the purchaser for the price of the goods.‡

(9) † *Tapley v. Martens*, 8 T. R. 451 ; *Marsh v. Pedder*, 4 Campb. 257 ;

*And therefore a *receipt* given by the creditor to [252]
an agent or broker does not necessarily of itself

Everett v. Collins, 2 Camp. 515; *Robinson v. Read*, 9 B. & C. 449. In the first of these cases the carrier took a bill from the consignee for the freight, and on its being dishonored, sued the consignor; and as it did not appear that he had the choice of taking cash from the consignee, it was held that the consignor remained liable. The same point was determined in the case of *Marsh v. Pedder*, where a bill had been taken from the agent of the freighter. "The defendants," said Chief Justice Gibbs, "must still pay the freight, unless in point of law the whole had been already paid. Now suppose the defendants themselves had paid the plaintiff partly in cash and partly by a bill of exchange, which turned out to be good for nothing, it seems to be admitted that they would not be discharged. The result is the same where the payment is made by an agent. If the bill is not paid, the principal remains liable. Circumstances may vary the effect of taking a bill of exchange either from the agent or the principal. If the party having the offer of cash, merely for his own accommodation prefers a bill of exchange, upon that he must seek his remedy." In *Everett v. Collins* the creditor elected to take a *check* from the agent rather than cash, and yet on the dishonor of the check the seller was permitted to recover from the principal. But the circumstances of that case were peculiar. Lord Ellenborough considered the person by whom the check was given as merely the *servant of the debtor for the purpose of payment*, and the check, therefore, as the check of the latter, in which view it was clearly no payment. *Robinson v. Read* is, perhaps, the strongest case. A tradesman having supplied goods to a ship, sent in his account to the owner's agent and ship's husband, and took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit, and when the bill became due, consented to a renewal of it, adding interest, and in like manner took a third acceptance which was dishonored: the agent soon afterwards failed, the balance in his hands in favor of his principal the ship-owner, having, during all this time, exceeded the amount of the bill, *which fact, however, was not known to the principal, who had never inspected the agent's accounts*; and it was held that the liability of the ship-owner was not discharged by these dealings with the agent. "It does not appear," said Lord Tenterden, "that the defendant *sustained any injury* in consequence of the plaintiff's having taken the bill from the agent. He never looked into the accounts, nor inquired how the agent was using the money. Then the single question is whether the agent *has paid the debt*." And Parke, J., added, "It is clear that the debt was originally due from the defendant to the plaintiff. The defendant, therefore, was bound to make out in evidence such an answer as could have been pleaded. Could the transaction in question have been pleaded as *payment*? Clearly not; for unless a bill is taken by choice instead of cash, it is not equivalent to payment.

[*253] *operate as a discharge to the principal ; nor has it that effect unless the principal appear to have dealt differently with his agent in consequence of the receipt, as by passing it in his accounts, and giving him further credit upon the faith of that voucher.(i) But where the receipt is the means of accrediting the agent with his principal, or altering the situation of the latter, the creditor

Then could it be pleaded as *accord and satisfaction*? There may be some evidence of that, but not sufficient to warrant our drawing such a conclusion."‡ ¶ A bill, acceptance, or promissory note, either of the debtor or of a third person, is not a payment or extinguishment of a pre-existing debt, unless accepted as such. When the instrument is given at the time, and as part of the transaction, it is merely an extension of credit, leaving the remedy on the original consideration unimpaired ; and not, as in the case of a specialty, or judgment, restricting it to the security alone. "Therefore," says Parker, C. J. "when goods are purchased upon credit, or money borrowed, and the security agreed upon by the parties turns out to be of no value, and different from what it was represented to be by the debtor, it may be treated as a nullity." *The Manufacturers and Mechanics Bank v. Gore*, 15 Mass. Rep. 75, 79. The principle is well stated by Sutherland, J. as follows: "A distinction is sometimes taken upon this subject, which requires to be a little considered. It is this: that the note of a third person, if taken at the time of making the contract is payment ; but if given for an *antecedent debt*, it is not. Now, I apprehend, that it is payment in neither case, unless it is agreed to be so taken ; and if so agreed, it is equally payment when taken for an antecedent debt, as when taken for a debt contemporaneous with the agreement. In either case, the inquiry is the same—did the creditor agree to take it as payment? and so are all the cases." *Porter v. Talcott*, 1 Cowen, 359, 383 ; *Harris v. Johnston*, 3 Cranch, 318 ; *Sheeky v. Mandeville*, 6 Cranch, 268 ; *Tobey v. Barber*, 5 Johns. Rep. 68 ; *Schermerhorn v. Loines*, 7 Johns. Rep. 311 ; *Johnson v. Weed*, 9 Johns. Rep. 309 ; *Muldon v. Whitlock*, 1 Cowen, 290 ; *Porter v. Talcott*, id. 359 ; *Whitbeck v. Van Ness*, 11 Johns. Rep. 409 ; *Corlies v. Cumming*, 6 Cowen, 121 ; *Van Ostrand v. Reed*, 1 Wend. 424 ; *Watson's Ex'rs. v. McLaren*, 19 Wend. 562 ; *Brown v. Jackson*, 1 Wash. C. C. Rep. 516 ; *Parker v. The United States*, Peters' C. C. Rep. 262 ; *The United States v. Lyman*, 1 Mason, 482 ; *Hays v. Stone*, 7 Hill, 128 ; *Hughes v. Wheeler*, 8 Cowen, 77 ; *Frisbie v. Larned*, 21 Wend. 450 ; *Cole v. Sackett*, 1 Hill, 516 ; *James v. Williams*, 13 Mees. & Wels. 828. The circumstance of the note or bill being given by an agent of the principal debtor cannot vary the question. 1 Liv. Pr. & Ag. 207 ; *Porter v. Talcott*, ubi supra ; ante, 247, n. (3) ; *Frisbie v. Larned*, 21 Wend. 452.¶

(i) *Wyett v. Marquis of Hertford*, 2 East, 147 ; Amb. 269.

can only resort to the agent.(k) Accordingly, in the insurance trade, where the usage is for the broker of the assured to charge his employer with premiums as paid to the underwriter, though in fact there be no money paid, but a running account kept between the broker and underwriter, it is held that the receipt in the policy whereby the underwriter confesses himself paid the *premium, [*254] is conclusive as between him and the principal.(l)

(k) 3 East, 157; Ambl. 269. ¶ Where a person supplied stores to a ship, of which there were several owners, on the order of one of them who acted as ship's husband, and took his note in payment, and gave a receipt in full, it was held to be no discharge of the other owners, especially as it did not appear that the plaintiff knew at the time, that there were other owners. *Schermerhorn v. Loines*, 7 Johns. Rep. 311. In *Cheever v. Smith*, 15 Johns. Rep. 277, the Supreme Court of New York, say: "If a man deal with another's agent, and gives the agent a receipt for a sum of money which he had a right to pay, and on the faith of that receipt the principal settles with his agent and pays him money—the party giving the receipt cannot lie by, until after the settlement between the principal and the agent, and then charge the principal with the payment of the same sum again. Good faith requires that the mistake should be communicated to the principal as soon as it is known; and, indeed, if a loss is to be borne, it must fall on him who occasioned it." "The true principle," says Sutherland, J. "applicable to this class of cases, seems to be this: If a man deal with the agent of another, in such manner as to enable him to settle with his principal, and receive from him a sum of money or other advantage, which otherwise he would not have been able to obtain, and the principal does, in truth, so settle with his agent, he shall not afterwards, be responsible upon the contract of the agent, if he fail to pay." *Muldon v. Whitlock*, 1 Cowen, 308. The main question in all such cases must be—to whom did the person dealing with the agent intend to give credit?—to the agent or the principal?—If the credit were exclusively given to the agent, then the agent is the only person to be looked to; if to the principal, then the agent is exonerated. Cases of this kind must depend upon the circumstances of the particular case; and those circumstances are to be ascertained by the fallibility of human evidence. *Pentz v. Stanton*, 10 Wend. 271. The subject is not susceptible of being treated aphoristically.¶

(l) *Dazel v. Mair*, 1 Campb. 532. That a receipt ¶ although expressed to be in full ¶ does not of itself preclude evidence of the money not having been actually paid, see 2 P. Wms. 295; 1 P. Wms. 83, note 1; 2 Eq. Ca. Ab. 742; 2 T. R. 366; ¶ *Tobey v. Barber*, 5 Johns. Rep. 68; *Schermerhorn v. Loines*, 7 Johns. Rep. 311; *Van Rensselaer v. Morris*, 1 Paige, 13; *Fairmaner v. Budd*, 7 Bing. 574; *Muldon v. Whitlock*, 1 Cowen, 290;

[But if it appear that a fraud has been practised upon the underwriter, by a collusion between the broker and assured, the underwriter may maintain an action for the premiums against the assured, notwithstanding the receipt on the policy.(18)]

Stackpole v. Arnold, 11 Mass. Rep. 27. As to the conclusiveness of a stated account. See ante 52. In the cases therefore where a receipt would not protect the principal, it would not be a bar to a demand upon the agent.

(18) [*Foy v. Bell*, 3 Taunt. 493 ; and *Mavor v. Simeon*, ib. 497, n.]

CHAPTER III.—PART II.

HAVING thus briefly treated of the contracts of agents, we come in the next place to consider how principals are affected through the medium of their representatives, in matters *connected with* those contracts.

Those who deal with an agent authorized to bind his employer by his contracts, must, for all purposes connected with such dealings, consider themselves as dealing with the employer himself; and therefore the latter is not only bound by the contract itself, but is affected by the representations or admissions of his agent, or by his knowledge, in the same manner as he would [be] by his own. It may be proper, therefore, to consider distinctly the effect, first, of those representations made by agents which are deemed a part of the contract virtually entered into by the principal; secondly, the effect of notice to agents as affecting their employers with the consequences of personal notice; and, thirdly, the force of admissions made by agents as being equally conclusive with those made by the principal himself.

*SECTION 1.

[*256]

Representations, &c. of Agents.

1. Representations made by an agent accompanying a contract entered into with him, affect the principal as part of the contract.(A)

(A) || *A fortiori* if the representation be made in the presence of the principal. *Gilkeson v. Snyder*, 8 Watts & Serg. 200.||

But to have this effect, they must be such as are made in the course of his employment about the particular contract in question. Thus, in an action for selling coals short of measure, evidence was given of the representations of the defendant's manager and agent as to the coals then upon sale, which formed the ground of the action; but what he might have said on another occasion, or respecting another sale, would not have been admitted.(a)(1)

(a) *Peto v. Hague*, 5 Esp. 135. See post, § 268, et seq.¶

(1) See on this subject Mr. Phillips' Treatise on Evidence, 7 ed. p. 99, et seq. ¶ *Lee v. Munroe*, 7 Cranch, 366; *Leeds v. The Marine Ins. Co. of Alexandria*, 3 Wheat. 380; *The American Fur Co. v. The United States*, 2 Peters, 358; *Hubbard v. Elmer*, 7 Wend. 446; *Sandford v. Handy*, 23 Wend. 260; *The Bank of the United States v. Davis*, 2 Hill, 464; *North River Bank v. Aymar*, 3 Hill, 262; *Nelson v. Cowing*, 6 Hill, 336; *Lobdell v. Baker*, 1 Metc. 193; *Earl of Glengall v. Frazer*, 2 Hare, 104; *Berrien v. McLane*, 1 Hoff. Ch. Rep. 443; *Stockton v. Demuth*, 7 Watts, 39; *Hannay v. Stewart*, 6 Watts, 487. "It is not true," says Dallas, C. J. "that where an agency is established, the declarations of the agent are admitted in evidence, merely because they are his declarations; they are only evidence when they form part of the contract entered into by the agent on the behalf of his principal, and in that single case they become admissible. The declarations of an agent at a different time, have been decided not to be evidence; indeed the cases on the subject draw the distinction between the declarations of an agent accompanying the making of, and therefore forming a part of the contract, and those declarations that are made either at a subsequent or an antecedent period.—*Fairlie v. Hastings*, 10 Ves. 123, (post, 269,) is the latest authority on the subject; and it was there held by the late Master of the Rolls, on a review of all the decisions, that, although an agency is established, a declaration of the agent can only be evidence against the principal, where it accompanies the transaction about which he is employed, and if made at another time it is not admissible." *Betham v. Benson*, 1 Niel Gow, 45. The admissions or declarations of an agent relative to the settlement of an account made *seventeen months* after the pretended settlement, where there is no proof of a settlement in fact, are not admissible in evidence against his principal, Marcy, J. "Where a party is bound by the act of his agent and the declarations of the agent qualify or affect that act, these declarations may be proved against the principal; but they are not proved as declarations or admissions merely, but as a part of the *res gesta*. The act and the words together make the whole thing to be proved. The fact to be established in this case was, the settlement by the agent of the plaintiff with the defendant, or the payment to the agent [of] all the moneys received on account

‡ It has been already seen that a warranty given on the sale of a horse by a servant, ordinarily employed to sell, is binding upon the master; (2)‡ but to affect an employer with a warranty made by his agent on a sale, it must be made at the time of the sale, ‡ or must be connected by direct reference with the sale.‡ Thus an agent, employed to sell a horse, stated the *age to the buyer [*257] at the time of showing the horse: but nothing was then said as to the price. It was held, in an action upon the warranty of age, that there being no complete contract of sale at the time of making the statement, for want of a price being fixed, it did not amount to a warranty by the agent at the time of the sale, so as to bind the master.(b)

of the plaintiff. What was done and said at the settlement, or when the moneys were actually paid over, might well be proved; but not T.'s [the agent] representation of it, even if it had been made in an hour after the business was closed." *Thalhimer v. Brinckerhoff*, 4 Wend. 394. Where some evidence of the existence of an agency has been given, it is competent to give in evidence the acts and declarations of such agent respecting the subject matter of his authority; and whether his agency had then ceased, or was continued, must be submitted as a matter of fact to the jury, with the direction, that if his authority had ceased, his acts and declarations are to be disregarded. *Stewartson v. Watts*, 8 Watts, 392.

"It is dangerous," Tindal, C. J. says, in *Garth v. Howard*, 8 Bing. 451, "to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the court and jury frequently after long intervals of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. Evidence therefore of such a nature ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case, appears to us to exceed those limits, we think there ought to be a new trial."||

(2) ‡ *Alexander v. Gibson*, 2 Campb. 556, ante.‡ || 197, 198, 209, 210.||

(b) *Helyear v. Hawke*, 5 Esp. 72. ‡ And see 2 Ld. Raym. 1120; 1 Str. 414; Dyer, 76, a; Cro. Jac. 197, 630; 1 Roll. Abr. 96; 1 Salk. 211; 5 Dow, 164; 1 Camp. 361; 3 Camp. 523; 5 B. & A. 240; 1 Ry. & M. 136, 290. The proposition in the text is a general rule applicable to all

But where a sale is made under written particulars, the verbal declarations of the agent or auctioneer at the time of sale are not admissible to contradict the particulars.(c)(3)

representations, whether made by the party himself, or by his agent, as connected with the contract.†

(c) *Gunnis v. Erhart*, 1 H. Bl. 289. (*Powell v. Edmunds*, 12 East, 6; *Howard v. Braithwaite*, 1 Ves. & Bea. 210; *Jones v. Edney*, 3 Camp. 285, S. P.) ¶ *Lessee of Wright v. Deklyne*, Peters' C. C. Rep. 199. An auctioneer has no authority to give a warranty on a sale. *The Monte Allegre*, 9 Wheat. 616; ante, 197, n. h.¶

(3) [Although the verbal declarations of an auctioneer at the time of sale be not receivable in evidence to contradict the printed particulars; yet where personal information is given to the purchaser of a mistake in the particulars, there might in such case be room for the admission of such evidence. *Ogilvie v. Foljambe*, 3 Merivale, 53.] ¶ In *Eden v. Blake*, 13 Mees. & Wels. 614, the auctioneer previously to the sale, stated publicly from his box, and in the hearing of the defendant, that the catalogue was incorrect as to that particular article. The defendant was held to his bid. And see *Bradshaw v. Bennett*, 5 Carr. & Payne, 48; *Shelton v. Livins*, 9 Tyrw. 420; 2 Crompt. & Jer. 411.¶ † In what cases verbal statements made before the completion of a contract, which is afterwards reduced into writing, can be received in evidence, see *Pickering v. Dawson*, 4 Taunt. 779, per Gibbs, C. J.; *Kain v. Old*, 2 B. & C. 634, per Abbott, C. J.¶ All preceding negotiations, are merged in the written contract; it is *that* which concludes the parties, unless mistake, or fraud, can be shown, which is a matter to be proved by the party alleging it. Nor does the rule extend to a subsequent parol modification, or waiver, of the original writing. A dangerous exception. 2 Kent's Comm. 556; *Keating v. Price*, 1 Johns. Cas. 22; *Bradley v. The Washington &c. Steam Packet Co.*, 13 Peters, 103, 104; *Packhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273; *Crosier v. Acer*, 7 Paige, 141; *Mumford v. McPherson*, 1 Johns. Rep. 418; *Philips v. Rose*, 8 Johns. Rep. 392; *Van Ostrand v. Reed*, 1 Wend. 424; *Blood v. Goodrich*, 9 Wend. 68; *Seabury v. Hungerford*, 2 Hill, 84; *Stackpole v. Arnold*, 11 Mass. Rep. 30; *Barber v. Brace*, 3 Conn. Rep. 9; *Lander v. Clark*, 1 Hall, 360, 361; 1 Story's Eq. § 160. But where the original contract was required by statute; e. g. the statute of frauds, to be reduced to writing, is not the exception excluded? The entire contract may be waived, so as to preclude either party from enforcing it; but a varied or distinct parol agreement cannot be made the foundation of a claim. Thus in a case arising under the section of the statute of frauds, (29 Car. 2,) relative to contracts and sales of lands &c. the distinction was taken; and the following extract from the opinion of Denman, C. J. is here introduced, as affording a luminous view of the whole subject. In delivering the judg-

In contracts of *insurance*, where the mis-statement or suppression of any fact which could influence the judg-

ment of the court the Chief Justice says : “ By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract ; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract ; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any act of parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question ; and that the action might be maintained. But the statute of frauds has made certain regulations as to contracts for the sale of lands, &c. &c.—It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing ; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion upon that point, as this is not a waiver and abandonment of the whole written agreement, but only a part of it ; and the question is, what is the effect of that ?—It may be said by the plaintiff, that this does not in any degree vary what is to be done by either party ; that the same land is to be conveyed ; there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid, and that it is only an abandonment of a collateral point. But we think the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But in the present case, the written contract is not that which is sought to be enforced. It is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement ; the present contract, therefore, is not a contract entirely in writing, &c.—There have, however, been some cases on contracts within the statute of frauds, where verbal evidence has been allowed. These were cases where the time for the performance of the

[*258] ment of the underwriter goes to *the foundation of the contract itself, it is not less fatal to the right of the party claiming the benefit of the insurance, that the error was produced by the act of his agent, than if it had been wilfully occasioned by himself: and therefore the most explicit disclosure by the assured to his agent, of all the facts within his knowledge,^(d) with the intention that they should be communicated to the insurers, will not assist his right to recover, if any part of that intelligence, or of what the agent may be in possession of from other sources, if material, have been withheld.^(e) It may be sufficient to illustrate this doctrine by the case of *Fitzherbert v. Mather*,^(f) from which it appears, that although both the assured and the person actually effecting the insurance are ignorant of the fact concealed or mis-stated, yet if the truth be known to an intermediate agent concerned in the transaction, it will vitiate the policy. In that case, which was an action by the assured against the underwriters on a voyage from *Hartland* to *Portsmouth*, the plaintiff had given an order for corn to *Thomas*, a corn factor at *Hartland*, who shipped it accordingly for *Portsmouth*, where the plaintiff resided; and the same day advised the

[*259] plaintiff and another person, the *plaintiff's corres-

contract had been enlarged by a verbal agreement, and they were decided on the ground that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say whether these cases were rightly decided; if they were so, still the present is a different case, for here, without doubt, the terms of the original contract were varied." *Goss v. Lord Nugent*, 5 Barn. & Ald. 58. And see *Blood v. Goodrich*, 9 Wend. 79; 2 Rev. Stat. N. Y. (2d ed.) p. 69, § 6. The phraseology of the statute of New York, being somewhat different from the stat. of Car. 2., the distinction alluded to by Denman, C. J. between the direction that a contract shall be in writing, and the prohibition to sue upon a contract not in writing, is inapplicable under the subsisting law of that state.¶

(d) *Seaman v. Fonnereau*, Str. 1183; *Roberts v. Fonnereau*, Beawes, 266; post, 259, n. (g).

(e) Park. 207, 209.

(f) 1 T. R. 12.

pondent in *London*, of the ship's sailing. The latter person, by the plaintiff's direction, which he received on the same day with the first advice, insured the voyage from *Hartland* to *Portsmouth*. At the time the letter was written by *Thomas*, containing advice of the ship's sailing from *Hartland*, she had really sailed, and was in safety as stated in that letter ; but before the letter left *Hartland* for *London*, and in time to have sent advice by the same post, it was known to *Thomas* that the ship had struck upon *Hartland* pier, and was lost. Upon these facts, it was held that the policy was void ; for the underwriter, upon the faith of *Thomas's* letter, was warranted in supposing that the ship was safe at the latest moment at which the letter could have left *Hartland*.(A)

(A) ¶ Whether the fraudulent delay or omission of the master of a vessel to give information to his owner of a loss, or accident, which had it been known, at the time of effecting the policy, would have prevented its being entered into, was such a concealment as vitiated the insurance, was a question discussed and decided in the following case, from which the principle is to be deduced that the master is not necessarily the agent of the owner as regards matters of insurance, so that his knowledge of the fact would be implied notice to his principal.

Ruggles v. The General Interest Ins. Co., 4 Mason, 74, was decided in the first place by the Circuit Court of the United States, for the District of Massachusetts. The judgment of the Circuit Court was affirmed by the Supreme Court of the United States. *The General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408. An ample statement of the case is deemed excusable ; and the more so, that in the piratical condensation of Mr. Wheaton's Reports, the opinion of the Judge who delivered the decision of the appellate tribunal is omitted.

The case was as follows. It was an action on a policy of insurance, dated the 9th of February, 1824, for 3000 dollars, on the sloop *Harriett*, *lost or not lost*, at and from Newport in Rhode Island, to, at, and from, all ports and places to which she may proceed in the United States, during the term of six months, *beginning on the 12th of January, 1824*. Also 600 dollars property on board said sloop, at and from Newport to Charleston or Savannah, or both. On the 19th of the same January, the vessel was wrecked on Cape Hatteras, whilst proceeding on her voyage, and both vessel and cargo lost. An abandonment was duly made, and a total loss claimed. It appeared in evidence, that the master, after the loss, expressed his determination not to give any notice of the loss to the owner, in order that

It was there said, that the principal must be taken to

the owner might effect insurance before the fact was known, and also took other means to prevent its becoming public.

Story, J. in summing up on the trial said: "It is argued by the counsel for the defendants, [the Insurance Company,] that after the loss, the master wilfully omitted to communicate intelligence of it to the owner, with the fraudulent design to enable him to make insurance, which conduct, although the owner be entirely innocent and unknowing of the act or intent of the master, and of the loss, avoided the policy *bona fide* made by the owner after the loss. In support of this doctrine, various cases are cited. And first the case of *Fitzherbert v. Mather*. That case is distinguishable from the present. It turned upon the point, that a letter written on the 16th of September, and sent by the post at 12 or 1 o'clock P. M. of the 17th of the same month, after the loss was known, (though the loss took place after the letter was written,) was a misrepresentation *avoiding the policy*, and that such misrepresentation, arising from the act of the plaintiff's agent, connected with the making of the insurance, bound him. Lord Mansfield said, that the underwriter was warranted, on the information of the agent, in believing that the vessel was safe at noon of the 17th; the case is the same as if the principal had produced the letter of the 16th to the underwriter. But in this case no letter was written or shown, and no representation made. Secondly, *Gladstone v. King*, 1 M. & Selw. 35, is cited. In that case a letter was written by the captain and received by the owner, (and of course presumed to be shown to the underwriter,) in which no notice was taken of an antecedent partial loss. The owner procured a policy covering *all risks from the commencement of the voyage*. The question was, whether the partial loss could be recovered. The court held, that it could not be; and the decision was in principle right; for it falls directly within the authority of the case in 1 Term Rep. 12. There was an implied warranty on the part of the owner, that there was no loss up to the time of writing that letter. The underwriter had a right to presume it. It is true that in this case it is not stated that the underwriter saw the letter of the captain. Neither is it stated in the case of *Fitzherbert v. Mather*, that the letter in that case was seen by the underwriter. But the reasoning of the court implies its materiality to the risk. The case is imperfectly reported. But the court did not proceed on this general ground. They held, not that the policy was void for this concealment, but that the loss was an *exception* from the policy. This doctrine is new. It was so admitted by the court. It stands on no principle.—The court say that "what is known to the agent is impliedly known to the principal, and that the captain knew and might have actually communicated to the plaintiff the cause of damage." To the extent thus stated the doctrine is not law. The knowledge of an agent is knowledge of the principal so far only as the agency extends. The master is not the agent of the owner as to insuring; otherwise the owner could never insure after a loss, though it was unknown formally to him. The

know whatever the agent knows ; for where one of two

law is clearly otherwise. But the case is unlike the one at bar. Here the captain never wrote at all.

“The third case cited is *Andrews v. Marine Ins. Co.* 9 Johns. Rep. 32. This was a joint insurance on account of the master, who was a part owner, as well as of the other owners. The court held, that there was no fraud in the master's omission to give intelligence of the loss ; that he exercised ordinary diligence though the delay was long.—Fourthly, *Stewart v. Dunlap*, 4 Bro. Parl. Cas. 483. The insurance in this case was procured by means of the *clerk*, who wrote, by direction of the owner, the letter for insurance, after he had had a communication with *Brog*, which must have lead him to suppose that there was a loss. The court must have proceeded upon the ground, either that the plaintiff knew of the loss, or that his clerk, his agent, in writing for the insurance, knew of the loss. The inference of knowledge on the part of the owner appears to me irresistible.

“No other authorities have been produced. We must then consider it upon general reasoning. The principle contended for is new. If well founded, it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must then be upon the ground, that the act of the master binds the owner ; and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. The owner does not guaranty the fidelity of the master to all the world, or to the insurer in particular. On the contrary, the insurer sometimes insures against the misconduct of the master, [*e. g.* in the case of *barratry*.]—It is said, that he who reposes the confidence in such a one should bear the loss. But underwriters, equally with owners, repose confidence in the masters. The master is the agent for all concerned. In case of loss he acts for all concerned. In the case of an abandonment, he is retroactively the agent of the underwriter, from the time of the loss on which the abandonment is founded. What reason is there why owners, acting innocently, may not insure against *bona fide* losses, of which the master withholds the knowledge?

“The court is called upon to lay down a new principle, to extend the present boundaries. But I see no analogies to lead me farther, and no public policy indispensably requiring a stricter rule. I am ready to declare my opinion against the general principle as argued by the defendant. But as the plaintiff has in argument restricted it to the facts of the present case, I do not wish to go beyond them. My opinion is, that in the present case, where there has been an abandonment in due time, for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith in procuring the insurance, he is

innocent persons must suffer by the fraud or negligence of

not precluded from a recovery, nor is the policy void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and with the fraudulent design to enable the owner to make insurance after the total loss, the owner not being conscious of any such act or design at the time of such insurance. My opinion also is, that it was the duty of the master to give information of the loss to his owner as soon as he reasonably could, and that his omission was a plain departure from his duty."

Thompson, J. delivering the opinion of the Supreme Court affirming the former judgment, after stating the facts of the case, proceeds, *inter alia*, to say: "The statement of the case admits fraudulent misconduct on the part of the master, by reason whereof the policy was effected before any knowledge of the loss reached the assured or the underwriters; but that the assured was entirely ignorant of this misconduct in the master; and that, on his part, there was the most perfect good faith in procuring the policy. Here, then, is a loss thrown upon one of two innocent parties; and the question is, by which is it to be borne. The determination of this question must depend, in a great measure, if not entirely, upon the relation in which the master stood to the respective parties when this misconduct occurred. If the loss of the vessel had been occasioned by any misconduct of the master short of barratry, whilst in the prosecution of the voyage, and before the loss happened; or if at the time this misconduct is alleged against him, he was the exclusive agent of the owner for any purposes connected with procuring the insurance, the owner must bear the loss. But if, after the loss, the agency of the master ceased, and was at an end, or if he, in judgment of law, became the agent of the underwriters, his misconduct cannot be charged to the assured. The researches of counsel have not furnished the court with any adjudged cases either in the English or American courts, which seem to have decided this question.—The precise point, therefore, now before the court, may be considered new, but we apprehend is to be governed by the application of principles understood to be well settled in the law of insurance.

"The case has been argued on the part of the underwriters, as if the agency growing out of the relation of master and owner of the vessel existed at this time; and that the assured was responsible for all consequences arising from the misconduct of the master; and that the law would presume, that whatever was known to the master, must be considered as impliedly known to the owner. These propositions may be true, when applied to a state of facts properly admitting of such application; but cannot be true to the extent to which they have been urged in the present case. If the owner is presumed to know whatever is known to the master, there could be no valid policy effected upon a vessel, after she was in point of fact lost. Such loss must be known to the master; and if it follows as a legal conclusion, that it is known to the owner, the policy would be void. Nor

a third, the question is, which of the two gave credit? and

upon this doctrine could there ever be any insurance against barratry or any other misconduct of the master. The knowledge of the agent therefore, with respect to the fact of *loss*, cannot affect the insurance; nor could the knowledge of the owner himself, with respect to such loss, affect the insurance in all cases. Suppose the owner should himself be the master, or be on board, having left orders with an agent to procure insurance in a given time, unless he should hear from him, or have information of the arrival of the vessel at her port of destination; and the vessel should be lost the day before the policy was underwritten, and at a distance that rendered it impossible that information thereof could reach the agent, would such a policy be void? No one could certainly maintain such a proposition. It is not, therefore, true as an universal rule, that either the fact of *loss*, or the knowledge of such fact by the agent or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes him responsible for his acts.—

“It is a little difficult to perceive, how, in any legal sense the relation, of principal and agent could exist, at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had terminated by the absolute destruction of the subject. The agency would seem to have ceased from necessity. There was nothing upon which it could act. Had there not been a total loss of the vessel, there would have remained a duty and legal obligation, on the part of the master, to use his best exertions to save what he could from the wreck. But when the subject matter of the agency becomes extinct, it is not easy to understand how, in any just sense, the agency can be said to survive. There might be a moral duty resting on the master to communicate information of the loss to his owner. But how could there have been any legal obligation binding upon him to do it? The information could neither benefit nor prejudice the owner. It is a general rule of law, that if an injury arises to a principal, in consequence of the misconduct of his agent, an action may be sustained against him for the damage. Could an action in this case be sustained by the owner against the master for not giving him information of the loss? and if not, it would seem to follow as a necessary consequence, that the owner could not be prejudiced by his acts.”

The learned judge, after reviewing the four cases relied upon by the insurers for their exoneration, proceeds: “It is no doubt true, with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agent; and that any misrepresentation, or material concealment by the agent, is equally fatal to the contract, as if it had been the act of the principal himself. But such responsibility must of necessity, be limited to cases where the agent acts within the scope of his

therefore, the plaintiff having trusted Thomas was bound to take the consequences.(g)(4)

[*260] *Upon the principle, that whatever is known to the agent must be taken to be known to the principal, it is immaterial through what channel the fact concealed happens to be known to the agent.(h) In the case of *Stewart v. Dunlop*, the clerk of the assured was proved to have had conversation the day before the insurance with a person who was acquainted with the loss of the ship. And though the clerk swore, that he had not received any

authority. In the present case, the master was clothed with no authority or agency, in any manner connected with procuring insurance. The misconduct charged against him occurred, not whilst he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved from necessity, by reason of a total destruction of the whole subject matter of the agency; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters and was their agent at the time of his alleged misconduct.—It is said, that if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear, that this end would be best promoted by adopting the rule contended for on the part of the underwriters.—If the underwriters feel themselves exposed to fraudulent practices in such cases, the protection is in their own hands, by not assuming any losses that may have happened prior to the date of the policy. It is considered a hazardous undertaking to insure *lost or not lost*, and a proportionate premium is demanded, according to the circumstances stated to show the probability or improbability of the safety of the subject insured.” As to insurance, *lost or not lost*, see further, *Callaghan v. The Atlantic Ins. Co. of New York*, 1 Edw. Ch. Rep. 75.¶

(g) *Roberts v. Fonnereau*, 1 T. R. 16, cor. Lee, C. J. Trin. 1742. A letter being received that a ship sailed from Jamaica for London on the 24th of November, after which insurance was made, and the agent told the insurer that the ship sailed the latter end of December, this was held a fraud, and verdict for the defendant. Beawes, 266.

(4) † And this on the plainest principles of equity. The question is, what contract would the underwriter have entered into if he had known those circumstances? A man cannot adopt another as his agent for making a contract, and repudiate his responsibility for the conduct of the agent in making it.‡ ¶ *The Bank of the United States v. Davis*, 2 Hill, 451; *North River Bank v. Aymar*, 3 Hill, 263; *Sandford v. Handy*, 23 Wend. 268; *Carpenter v. The American Ins. Co.*, 1 Story’s Rep. 57.¶

(h) *Seaman v. Fonnereau*, Str. 1183.

hint of the loss in that conversation ; yet the Court of Session in Scotland, presuming that some intimation had been given to the clerk of the ship's loss, decreed the policy to be void ; and their decree was confirmed by the House of Lords.(i)

As the concealment of a material fact invalidates the policy, *a fortiori*, the representation of one which is false has the same effect ; and it makes no difference that the misrepresentation is without fraud, and that the fact alleged is true in the belief of the agent making it.(k)

(i) Park. 209.

(k) *Fillis v. Bruton*, Park. 182. "There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent, as in the case of one who insured a life, and affirmed it to be as good a life as any in England, not knowing whether it was or was not." Per Lord Mansfield, *Bree v. Holbeck*, Doug. 632. ¶ "Whether the party misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial ; for the affirmation of what one does not know, or believe to be true, is equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive ; for it operates as a surprise and imposition on the other party." But "the misrepresentation must be of something material, constituting an inducement, or motive to the act or omission of the other, and by which he is actually misled to his injury. In the next place, the misrepresentation must not only be in something material, but it must be in something, in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion equally open to both parties for examination and inquiry, and where neither party is presumed to trust to the other, but to rely on his own judgment." *Barbour, J. Smith v. Richards*, 13 Peters, 36, 37. "The principle is, that where a party affirms either that which he knows to be false, or does not know to be true, to another's loss, and his own gain, he is responsible in damages for the injury occasioned by such falsehood. This is a very just and reasonable principle, and is well established.—A party is presumed to have intended the consequences of his own acts." *Wilde, J. Lobdell v. Baker*, 1 Metc. 201 ; and see *Rosevelt v. Dale*, 2 Cowen, 129 ; S. C. 5 Johns. Ch. Rep. 174 ; *Moens v. Heyworth*, 10 Mees. & Wels. 146 ; *Taylor v. Ashton*, 11 Mees. & Wels. 401 ; *Schneider v. Heath*, 3 Campb. 508 ; *Hazard v. Irwin*, 18 Pick. 96 ; *Stone v. Denny*, 4 Metc. 151 ; *Medbury v. Watson*, 6 Metc. 260 ; *Kidney v. Stoddard*, 7 Metc. 254 ; *Calla-*

[*261] *But in order to have this effect upon the policy, the mis-statement must be at the time of underwriting the policy ; for where, on a former occasion, viz. when the slip was subscribed, the ship was described by the broker as American, but no such representation was made at the time of subscribing the policy ; the broker saying generally, that it was an insurance on goods on board

ghan v. The Atlantic Ins. Co. of New York, 1 Edw. Ch. Rep. 64 ; 1 Story's Eq. § 191, 193, 195, 197.¶

‡ The representations or concealment of the accredited agent affect the assured exactly as if made by *himself*. What amounts to a concealment of material facts sufficient to avoid a policy will be seen in the following cases : *Webster v. Foster*, 1 Esp. N. P. C. 407 ; *Willes v. Glover*, 1 N. R. 14 ; *Kirby v. Smith*, 1 B. & A. 672 ; ¶ *Ruggles v. The General Interest Ins. Co.*, 4 Mason, 80 ; *Mackintosh v. Marshall*, 11 Mees. & Wels. 116 ; *Vale v. Phoenix Ins. Co.*, 1 Wash. C. C. Rep. 283 ; *McLanahan v. The Universal Ins. Co.*, 1 Peters, 170 ; *Fiske v. The New England Marine Ins. Co.*, 15 Pick. 310 ; 1 Story's Eq. § 216 ; *Ely v. Hallett*, 2 Caines' Rep. 57.¶ To what extent the assured or his agent is bound to communicate spontaneously the facts within his knowledge, may be seen from the cases of *Haywood v. Rogers*, 4 East, 590 ; *Freeland v. Glover*, 7 East, 457 ; *Lynch v. Hamilton*, 3 Taunt. 37 ; *Rickards v. Murdock*, 10 B. & C. 527 ; *Lloyd & Wels.* 132. ¶ *Shirley v. Wilkinson*, 3 Doug. 41 ; *Elton v. Larkins*, 8 Bing. 198 ; S. C. 5 Carr. & Payne, 86, 385 ; *Durell v. Bederly*, Holt's N. P. Rep. 283, and reporter's note, *ibid* ; *Seton v. Low*, 1 Johns. Cas. 1.¶ The opinion of the agent that the facts not communicated were immaterial, will not vary the case. *Shirley v. Wilkinson*, Doug. 306. And whether the omission proceed from fraud, or from mistake, or from negligence, it will still be equally fatal. See *Carter v. Boehm*, 3 Burr. 1905 ; 1 Bl. 594 ; and *Ratcliffe v. Shoolbred*, Marsh. Ins. b. 1, c. 11, s. 2. ¶ *Lindenau v. Disborough*, 8 Barn. & Cress. 586 ; 2 Kent's Comm. 488, n. b. When an insurance is effected on the life of a third person by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health ; this will vitiate the policy, though the creditor for whose benefit the policy was effected, was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with. *Maynard v. Rhode*, 1 Carr. & Payne, 360. This case involves the whole doctrine on this subject, and whether it were a life, or marine insurance can make no difference.¶ A mere *opinion* need not be communicated. *Carter v. Boehm*, 3 Burr. 1905 ; *Bell v. Bell*, 2 Camp. 479.‡ ¶ *Claeson v. Smith*, 3 Wash. C. C. Rep. 156 ; *Durell v. Bederly*, *ubi supra* ; *Ruggles v. The General Ins. Co.*, *ubi supra* ; 1 Story's Eq. 197.¶

the *Hermon*, without describing her of any particular country, it was held that the principal was not bound by the representation ; and that the policy was not void by reason of the ship not being documented as an American,^(l) which she must *have been if the representation had been binding.^(m) However, in a subsequent case, a representation made at the time of putting the defendant's name upon the slip, that the ship was to carry ten guns and twenty-five men, was held binding where no subsequent conversation upon the subject took place ; Lord Ellenborough holding that a representation once made is to be considered as binding, unless there be evidence of its being afterwards altered or withdrawn.⁽ⁿ⁾

SECTION 2.

Effect of Notice to Agents.

If an agent come to the knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself.^(a) For, upon general prin-

(l) *Dawson v. Atty*, 7 East, 367.

(m) 8 T. R. 192.

(n) *Edwards v. Footner*, 1 Campb. 530. || The question is, did the representation constitute part of the *res gestæ*? The solution is of universal application, and not confined to the mere law of insurance. "The principal will be bound by the representation of his factor or broker, made with reference to any contract entered into by the latter on his behalf, unless there be evidence of such representation having been altered or withdrawn, previous to the completion of the contract." Russ. Fact. & Brok. 91.||

(a) 13 Ves. 121 ; 1 Ves. 62. || So, where there are several joint agents, notice to one, is equally notice to the principal. *The Bank of the United States v. Davis*, 2 Hill, 463, 464 ; post, 266, n. (h). Notice to one partner is notice to the firm. *The Fulton Bank v. The New York and Sharon Canal Co.* 4 Paige, 137 ; *Powell v. Waters*, 8 Cowen, 670 ; *Jeffrey v. Bigelow*, 13 Wend. 523. And all the members of the firm are chargeable with know-

ciples of policy, it must be taken for granted that the principal knows whatever the agent knows.(b) There is no difference between personal and constructive notice, except as to guilt; for if there were, it would produce great inconvenience, and notice would be avoided in every case by employing an agent.(c) This principle is adopted equally in law and in equity.(d)(A)

ledge of the entries made on their books by their agent, in the course of his business, and with the true meaning of the entries as understood by the agent. *Allen v. Coit*, 6 Hill, 318. One partner must be deemed to have notice of the irregular course of dealing of his copartner, to the prejudice of their customer, where by using ordinary diligence and attention in the management of the business, he might and must have discovered all the material facts, the means of knowledge being within his power. *Sadler v. Lee*, 6 Beav. 324.||

(b) 1 T. R. 16.

(c) Per Lord Northington, Ambl. 626.

(d) 4 T. R. 66.

(A) || "To constitute constructive notice, it is not indispensable, that it should be brought home to the party himself. It is sufficient if it is brought home to the agent, attorney, or counsel, of the party; for in such cases, the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter. But in all these cases, notice to bind the principal, should be notice in the same transaction or negotiation; for if the agent, attorney, or counsel was employed in the same thing by another person, or in another business or affair, and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal, on account of such defect of memory. It was significantly observed by Lord Hardwicke, that if this rule were not adhered to, it would make the titles of purchasers and mortgagees depend altogether upon the memory of their counsellors and agents; and oblige them to apply to persons of less eminence as counsel, as being less likely to have notice of former transactions." 1 Story's Eq. § 408. But the very exception above stated, may itself be liable to an exception. Ibid. n. (2). As to the general principle in regard to notice, actual or implied, and constructive; see post, 263, n. (f). As to the general rule that notice to the agent is notice to the principal and its limitations; see farther, *Astor v. Wells*, 4 Wheat. 466; *Bowman v. Watken*, 1 How. 196; *Winter v. Lord Anson*, 3 Russ. 493; *Dryden v. Frost*, 3 Myl. & Cr. 670; *Berkley v. Watling*, 7 Ad. & Ell. 29; *The Fulton Bank v. The New York and Sharon Canal Co.* 4 Paige, 137; *Griffith v. Griffith*, 9 Paige, 315; S. C. 1 Hoff. Ch. Rep. 153; *The Bank of the United States v. Davis*, 2 Hill, 452; *McEwen v. The Montgomery County Mutual Ins. Co.* 5 Hill, 101; *Allen v. Coit*, 6 Hill,

*The cases in which this doctrine is the most [*263] strongly exemplified are such as have arisen upon contracts of insurance, which have already been adverted to.(e) And the following authorities are conformable to the same principle. Thus, in an action for fraudulently making a false representation of a person's circumstances, whereby the plaintiff was induced to trust him, it was held by Lord Kenyon to be a good defence that the plaintiff's agent, to whom the representation was made, was himself aware of the insolvency of the person in question: and the jury were directed that the falsehood of the defendant's representation could not subject him to an action at the suit of the plaintiff, if he knew from his own knowledge that the person was not to be trusted: and that it was the same for that purpose if the agent had that knowledge, for that the plaintiffs must be considered as standing precisely in the same situation as he did.(f)

318; *Hood v. Fahnestock*, 8 Watts, (Pa.) Rep. 489; *Bracken v. Miller*, 4 Watts & Serg. 102; *Flagg v. Mann*, 2 Sumn. 554. So, notice to the trustee is notice to the *cestui que trust*. *Gilman v. Brown*, 1 Mason 207. And see *Padin v. Akin*, 7 Watts & Serg. 456.

Notice to the agent as has just been intimated, in order to affect the principal, must arise in the same transaction to which the agency applies. Where therefore, to an action brought for improperly loading a cargo of timber, whereby it was lost, the answer was, that it had been so loaded with the assent of the plaintiff, but the only evidence in support of this was, that the plaintiff's agent knew the manner in which it had been loaded without having made any objection thereto; it was held, that the knowledge and assent of the plaintiff could not be inferred from that fact, as it was not shown that the agent had any authority to interfere with the loading of the timber in question. *Gould v. Oliver*, 2 Scott, N. R. 241, 263; Russ. Fact. & Brok. 96.

The principle that notice to an agent is notice to his principal, does not apply to the case of surveys of entries of land made by public surveyors, in discharge of their public duties. The rule only applies to cases where there is a special trust or confidence reposed in the agent at the time of the transaction, or after, by the acceptance of the purchase by the principal. *Merril v. Sloan*, 1 Murphy's (N. Car.) Rep. 121.||

(e) Ante, p. 257.

(f) *Cowen v. Simpson*, 1 Esp. Cas. 290. || It may be well to consider in this place how the term "notice" is to be understood, and the distinc-

tion between actual and constructive notice, as established in courts of equity, as it is in those courts, to adopt the words of our author, *infra*, "the effect of notice to an agent has most frequently come in question." What constitutes express notice is a mere question of fact, which must depend on the weight of evidence ; but as to what shall be deemed implied, or constructive notice, our best lights are to be derived from the rules and decisions of courts of equity, where questions of this description are of constant occurrence. The following extracts and references in regard to this important doctrine will not, it is hoped, be thought inapposite to the subject of this work. "Notice," says the learned commentator on Equity Jurisprudence, "may be either actual and positive ; or it may be implied and constructive. Actual notice requires no definition ; for in that case knowledge of the fact is brought directly home to the party. Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not even allow of its being controverted. An illustration of this doctrine of constructive notice is, where the party has possession or knowledge of a deed under which he claims his title, and it recites another deed, which shows a title in some other person ; there, the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it. And, generally, it may be stated as a rule on this subject, that where a purchaser cannot make out a title but by a deed, which leads him to another fact, he shall be presumed to have knowledge of that fact. So, the purchaser is in like manner supposed to have knowledge of the instrument, under which the party with whom he contracts, as executor, or trustee, or appointee, derives his power. Indeed, the doctrine is still broader ; for, whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances and persons,) is in equity, held to be good notice to bind him. Thus, notice of a lease will be notice of its contents. So, if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate which these tenants have ; and therefore he is affected with notice of all the facts as to their estates.—But in a great variety of cases, it must necessarily be matter of no inconsiderable doubt and difficulty to decide, what circumstances are sufficient to put a party upon inquiry. Vague and indeterminate rumor, or suspicion, is quite too loose and inconvenient in practice, to be admitted to be sufficient. But there will be found almost infinite gradations of presumption between such rumor or suspicion, and that certainty as to facts, which no mind could hesitate to pronounce enough to call for further inquiry, and to put the party upon his diligence. No general rule can therefore be laid down to govern such cases. Each must depend upon its own circumstances. There is no case which goes the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a party, as if he were guilty of fraud, or wilful neglect, or had positive notice." 1 Story's Eq. Jurisp. § 399, et seq.

Another learned commentator sums up the rules on the subject as fol-

lows: "It is indeed difficult to define with precision, the rules which regulate implied or constructive notice, for they depend upon the infinitely varied circumstances of each case. The general doctrine is, that whatever puts a party upon an inquiry, amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchaser and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. So, notice of a deed is notice of its contents, and notice to an agent is notice to his principal. A purchaser with notice from a purchaser without notice, even in the case of an endorsement of a note, can protect himself under the first purchaser, who was duly authorized to sell; and a purchaser without notice, from a purchaser with notice, is equally protected, for he stands perfectly innocent.—There is also this further rule on the subject, that the purchaser of an estate in the possession of tenants, is chargeable with notice of the extent of their interests as tenants; for having knowledge of the tenancy, he is bound to inform himself of the conditions of the lease. The general rule is, that possession of land is notice to a purchaser of the possessor's title. The effect of notice on the equity and validity of claims is very strong. A purchaser of an equitable interest, standing out in a trustee, and who neglects to inform the trustee of it, will be postponed to a subsequent purchaser of the same interest, who makes inquiries of the trustee, and has no knowledge of the prior assignment, and gives due notice of his purchase. So, a purchaser of real estate cannot hold against a prior equitable title, if he have notice of the equity before the payment of the purchase money, or the execution of the deed." 4 Kent's Comm. 179.

We will conclude our extracts with a passage from a judgment of Vice Chancellor Wigram. "It is indeed," he says, "scarcely possible to declare *a priori*, what shall be deemed constructive notice, because unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes:—First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected; and the court has therefore bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. How reluctantly the court has applied, and within what strict limits it has confined the latter class of cases, I shall presently consider.—The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is not that the party charged had

incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries, for the purpose of avoiding knowledge,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,—then the doctrine of constructive notice will not apply; then the purchaser will, in equity, be considered as in fact he is, a *bona fide* purchaser without notice. This is clearly Sir Edward Sugden's opinion; (*Vend. & Pur.* vol. 3, pp. 471, 472, ed. 10,) and with that sanction, I have no hesitation in saying it is mine also." *Jones v. Smith*, 1 Hare, 43, 55. The decision of the Vice Chancellor in this case, was affirmed by Lord Lyndhurst, 1 Phillips, 244, who says (*ibid*, p. 254,) "I am not disposed to extend the doctrine of constructive notice, and in expressing this opinion, I believe I act in conformity with the opinion frequently expressed by my immediate predecessor;"—(Lord Cottenham.)

The positions contained in the foregoing extracts are stated, or admitted; applied and enforced; or qualified and explained, in the following cases, the number of which might have been easily increased; but the list may be useful, as they are principally of recent date: and it should besides be borne in mind that the topic of the present note is intimately connected with a subject coming more peculiarly within the scope of this work; that is, the effect upon the principal of notice to the agent. *Wormley v. Wormley*, 8 Wheat. 421; S. C. 1 Brockenbrough, 330; *Boone v. Chiles*, 10 Peters, 178; *Brush v. Ware*, 15 Peters, 93; *Cuyler v. Bradt*, 2 Caines' Cas. in Er. 326; *Dearle v. Hall*, 3 Russ. 1; *Miles v. Langley*, 1 Russ. & M. 39; S. C. 2 Russ. & M. 626; *Hanbury v. Litchfield*, 2 Myl. & K. 633; *Sterry v. Arden*, 1 Johns. Ch. Rep. 267, affirmed 12 Johns. Rep. 536; *Frost v. Beckman*, 1 Johns. Ch. Rep. 288; *Green v. Slayter*, 4 Johns. Ch. Rep. 46; *Chesterman v. Gardner*, 5 Johns. Ch. Rep. 29; *Rodriguez v. Hefferman*, *id.* 426, 427; *St. Andrew's Church v. Tompkins*, 7 Johns. Ch. Rep. 16; *Jewett v. Palmer*, *id.* 65; *Pitney v. Leonard*, 1 Paige, 461; *Gouverneur v. Lynch*, 2 Paige, 300; *Grimstone v. Carter*, 3 Paige, 421; *Harris v. Fly*, 7 Paige, 421; *The State of Illinois v. Delafield*, 8 Paige, 527; ante, 213, n. (c); *Griffith v. Griffith*, 9 Paige, 315; S. C. 1 Hoff. Ch. Rep. 153; *Attorney General v. The Life and Fire Ins. Co.* 9 Paige, 470, 477; ante, 202, n. (f); *Jackson v. Neely*, 10 Johns. Rep. 374; *Jackson v. Cadwell*, 1 Cow. 622; *Hawley v. Cramer*, 4 Cowen, 718; *Hoxie v. Carr*, 1 Sumn. 192; *Flagg v. Mann*, 2 Sumn. 491, 551, 556; *Eland v. Eland*, 1 Beav. 244, 245; *Farrow v. Rees*, 4 Beav. 18; *Meux v. Rees*, 1 Hare, 73; *Nessom v. Clarkson*, 2 Hare, 172, 173; *West v. Reid*, *id.* 258, 259, 260; *Merritt v. Lambert*, 1 Hoff. Ch. Rep. 166; *Williams v. Birbeck*, *id.* 359, 372; *Peters v. Goodrich*, 3 Conn. Rep. 150; *Sigourney v. Munn*, 7 Conn. Rep. 333; *Booth v. Barnum*, 9 Conn. Rep. 286; *Jackson v. Bowen*, 6 Cow. 145; *The Attorney General v. Pargeter*, 6 Beav.

150 ; *Paterson v. Long*, id. 590 : *Bugden v. Bignold*, 2 Yo. & Coll. C. C. 377, 390 ; *Kerr v. Lord Dungannon*, 1 Conn. & Law. 335 ; *Sutherland v. Briggs*, 1 Hare, 29 ; *Perkins v. Bradley*, id. 219 ; *West v. Reid*, id. 257, 259 ; *Nelthorpe v. Holgate*, 1 Coll. C. C. 203, 215. ||

The cases in which the effect of notice to an agent has most frequently come in question, are such as arise upon the alienation of real property ; which it may be proper briefly to refer to here. Those cases which seem to have gone the farthest upon this subject are *Brotherton v. Hall*, 2 Vern. 574, and *Jennings v. Moor*, 2 Vern. 609, which are ratified by the judgment of Lord Hardwicke, Ambl. 438. The first was shortly this : A. makes three several mortgages to B., C., and D. successively. In the last mortgage B. is a party, and agrees that after he is paid he will stand a trustee for D. Decreed that C. shall be paid before D., for all the securities being transacted by the same scrivener, notice to him of C.'s mortgage was notice to D. The second case was this : B., having notice of an incumbrance, purchases in the name of M., and then agrees that M. shall be the purchaser, and M. accordingly pays the purchase-money without notice of the incumbrance. Though M. did not employ B., nor knew anything of the purchase till after it was made, yet M. approving of it afterwards, made B. his agent *ab initio*, and therefore shall be affected with the notice to B. See also *Attorney General v. Gower*, 2 Eq. Ca. Ab. 685 ; 1 Ch. Ca. 39 ; † and *Sheldon v. Cox*, 2 Eden, 224. An agent received notes from an executor, payable to him as executor, as a security for advances made by the principal to the executor on his private account, and not in his character of executor : and it was held, that this was a notice affecting the principal, that he was dealing with the assets of an executor for purposes foreign to the trust which he had to discharge—that the principal thereby became a party to the *devastavit*, and liable to the consequences of it—and that he could not therefore retain the notes against parties claiming under the will. *Downes v. Power*, 2 Ball & B. 491. † || The rules that a purchaser is, in equity, chargeable with constructive notice of facts and circumstances which came to the knowledge of his attorney or agent for the purchase, or in the examination of the title, and that notice of a deed is a constructive notice of the contents thereof, do not apply to controversies between the vendor and purchaser in relation to their own rights. These rules as to constructive notice, are only adopted by the Court of Chancery for the protection of the prior equitable rights of third persons, against subsequent purchasers who claim in hostility to such rights. *Champlin v. Laytin*, 6 Paige, 189. ||

It is upon this principle that notice to attorneys or law agents employed in making purchases affects their employers. For instance, in the case of *Norris v. Le Neve*, 3 Atk. 23, a bill of review (which is granted upon discovery of new matter not known before the decree) was refused, where it appeared that a person employed as an attorney for the petitioner, not indeed in the suit, but in an ejectment upon the same title tried prior to the decree, had in his possession, at the time of that trial, the documents from which the new matter was collected. † And see *Ashley v. Baillie*, 2 Ves. 370. † || *Griffith v. Griffith*, 9 Paige, 315 ; S. C. 1 Hoff. Ch. Rep. 153 ;

Jones v. Smith, 1 Phillips, 256 ; *Hargreaves v. Rothwell*, 1 Keen, 159 ; *Tunstall v. Trappes*, 3 Sim. 301. Where the original lease contained unusual covenants, and the defendant entered into an agreement with the plaintiff for an under-lease, and took possession of the premises, no reference to covenants being made in the agreement, but the defendant's solicitor having had an opportunity of inspecting the original lease, it was held, that the defendant was bound to accept a lease with the unusual covenants contained in the original lease. *Cosser v. Collinge*, 1 Myl. & K. 283. A solicitor who prepared a deed of charge on behalf of the mortgagor and mortgagee, was held to have notice of that incumbrance, on the occasion of taking a subsequent mortgage of the same property to himself. *Perkins v. Bradley*, 1 Hare, 219.||

One seised in fee mortgaged and died, having devised to his younger son. The mortgagee assigned the mortgaged premises to the eldest son, upon being paid the money, and indemnified at his own request against the title of the younger son, of which he had heard. The eldest son mortgaged to B. who had advanced the money to pay off the first mortgage. It was proved that B.'s agent was present at the execution of the assignment by the first mortgagee, when the indemnity was required : and B.'s agent deposed that the title deeds were laid by him before counsel, who objected on the ground of the younger brother's title. Upon the question of notice to B. of the younger brother's title, it was held that there was such a general notice, either to the party or his agent, as made it his duty to inquire into the title, and that not having done so he must take the consequence. 1 Ves. 61 ; and see 2 Ves. 485. But notice to affect the principal must be in the same transaction, 3 Atk. 294, and between the same parties. *Ib.* 392. Therefore if an attorney be employed to look over a title, and by some other transaction foreign to the business in hand have notice, this shall not affect the principal. 2 Atk. 242 ; and see 2 Eq. Cas. Ab. 282, in marg. ; † 13 Ves. 120 ; Fitzgibbon, 207 ; 2 Ridgway, P. C. 394 ; 3 Madd. 34 ; 1 Turn. & R. 280.‡ || If one, in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards becomes the agent, attorney, or counsellor of a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. *Hood v. Fahnestock*, 8 Watts (Pa.) Rep. 489. In a later case in the same court, Sergeant, J. delivering the opinion of the court, alludes to a certain fact in the case, which, he says, "brings the case we think clearly within the rule cited by the court below from *Hood v. Fahnestock*, that to visit the principal with constructive notice, it is necessary that the knowledge of the agent or attorney should be gained in the same transaction. This is, at best, rather a dubious ground on which to conclude that the principal had notice—because, for various reasons, he may not communicate his knowledge to his principal, although it might strictly be his duty to do so. But to a certain extent, it has been so considered, and where it occurs during the same transaction, where the knowledge of it is fresh and the memory recent, and the events transpiring are of importance to the interests of the principal,

there is perhaps good reason for it. But it cannot be so inferred of an old and different transaction, of a knowledge deposited in a secret paper, one which the agent has long ago perhaps laid aside as obsolete, or which he may, as the plaintiff suggests, have an interest in suppressing all knowledge of, lest a development of it should defeat the object contemplated by him." *Bracken v. Miller*, 4 Watts & Serg. 102, 111. Trustees are not affected by notice to their agent which he did not receive in that character. *France v. Woods*, Tambl. 172. "Notice to the agent is notice to the principal, but then it must be in the character of agent." Leach, M. R. *ibid.* 176.

We have seen the strong and exclusive terms in which the rule, that notice to the agent, to affect the principal, must be notice in the same transaction, has been laid down; but it has certainly not been adopted to the full extent by some distinguished equity judges. In a case referred to, without giving its title, by Mr. Lloyd, *supra*, Lord Eldon said; "The Vice Chancellor in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." *Mountford v. Scott*, Turn. & Russ. 279. "In these observations" Lord Langdale, M. R. referring to the passage just quoted says; "I entirely concur;" and expresses himself "clearly of opinion, that when one transaction was closely followed by, and connected with another; or where it was clear as in the case before the court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was no ground for the distinction by which the rule, that notice to the solicitor is notice to the client had been restricted to the same transaction." *Hargreaves v. Rothwell*, 1 Keen, 154, 159, 160. Lord Plunkett speaking of the case of *Mountford v. Scott*, remarks; "The expressions of Lord Eldon in that case as to notice, have been much commented upon. I allude to what he says of an attorney having notice of a transaction in the morning, being held by a court of equity not to have forgotten it in the evening. It is impossible, looking at the cases, to give any meaning to those expressions of Lord Eldon, unless in reference to fraud; fraud must be taken to be an ingredient which he had in his view when he thus expressed himself; the very short lapse of time which he takes to illustrate his position, is almost conclusive on that point. How can a person imagine a professional man, having in the evening other than a clear knowledge of a transaction of that kind, which had taken place in the morning of the same day? and if he had a clear knowledge, it becomes so fraudulent on his part, that it is properly visitable on his principal." And in another place, the Lord Chancellor says, after again referring to the words of Lord Eldon: "The meaning of this cannot be otherwise than this, that if from the circumstances of the case, it satisfactorily appeared that the attorney, at the

time of the second transaction had full knowledge and recollection of the first transaction, it was fraudulent in him to conceal it from his principal ; and if so, the principal should not be at liberty to derive a benefit from the fraud of his attorney ; and that there was no abstract rule, that the knowledge which it was fraudulent in the attorney to conceal from his principal, must be acquired in the same transaction. However acquired, if it existed at the time of the second transaction, it was a fraud to conceal it, and this fraud of the attorney should be visited on his principal.—A case of *Smith v. Smith*, which was decided by me in January, 1834, has been referred to. I decided in that case, that a purchaser in 1785 was not to be affected by a knowledge acquired by his agent in 1776. It appears from the report, that I stated that ‘from the authorities, it was to be collected, that the knowledge of an agent to affect his principal with notice, must be a knowledge derived from one and the same transaction.’ If this proposition meant, that the knowledge acquired by the agent in the first transaction, could not by any evidence, however strong and clear, or under any circumstances, however cogent, be brought into connection with the second transaction, so as to affect the principal with notice, the proposition clearly was not true. If, on the other hand, it only asserted, that the mere circumstance of a knowledge acquired in a former transaction should not affect the principal with notice, as it would if acquired in the same transaction, the proposition appears to me to be true, and in that sense only could it be requisite to the decision which was made in the case. The first and second transactions were separated by an interval of nine years.—I think, therefore, I am at liberty to say, without disputing the authority of that case, or of any doctrine laid down therein, as bearing on the decision in it, that knowledge acquired in a former transaction may be so clearly brought home, and its continuance so clearly proved, as to make it fraudulent to conceal it, and that such fraud is visitable on the principal.” *Nixon v. Hamilton*, 2 Dru. & Walsh. 364, 390, 392, et seq. And see 1 Keen, (Am. ed.) 160, n. 1 ; 3 Russ. (Am. ed.) 493, n. 1 ; *Perkins v. Bradley*, 1 Hare, 230 ; *Griffith v. Griffith*, 1 Hoff. Ch. Rep. 158 ; *Toulmin v. Steere*, 3 Mer. 210 ; 1 Story’s Equity, § 408, n. 2.¶

It often happens, particularly in the purchase of real estates, that the same agent is employed for both parties ; and it has been uniformly held that both parties shall be intended to know whatever is in the knowledge of the agent, thus mutually entrusted by them. Each side is affected with notice as much as if different agents had been employed, *Ambl.* 439 ; ¶ *Dryden v. Frost*, 3 Myl. & Cr. 670 ; see ante, 33, n. 3 ;¶ and therefore one who advances money upon a void contract cannot protect himself by his ignorance of the facts, if the common agent were privy to them. *Dee v. Martin*, 4 T. R. 56. It is not material that the common agent was recommended by the party who benefits by the imposition. This is distinctly stated by Lord Hardwicke in a case which itself affords an instance of the rule. A woman previous to her marriage employed a person, by the recommendation of her intended husband, to provide a settlement for her upon certain estates of the husband, which was accordingly made ; but these

*But on a question in the Court of Chancery [*264] whether a written instrument should not be interpreted *differently from its apparent effect, by [*265] reason of its differing from the intent of one of *the contracting parties, which it was alleged was [*266] known to the other, the evidence amounting only to show that his agent had such notice, was not deemed sufficient to alter the apparent meaning of the contract.(g)

Notice, in order to affect the principal in respect to a contract concluded by the interposition of an agent, must be to an agent empowered to treat, and not to one who is merely employed to carry proposals from one side to the other.(h)

estates were subject to a former encumbrance, of which the agent was con-
sant. A bill was filed to set the second encumbrance out of the way, and
postpone it to the first, upon the ground of notice. Lord Hardwicke decreed
accordingly, and said, "If the wife placed confidence in I. N., no matter on
whose recommendation; if she relied enough on her husband to take his
recommendation, it is sufficient." *Le Neve v. Le Neve*, Ambl. 436, 439.

[In a recent case, where the purchaser of an estate employed the ven-
dor's agent, who had *actual* notice of an existing encumbrance which af-
fected it, it was decided by the late Master of the Rolls, that such notice to
the agent operated *constructively* as a notice to his employer, notwithstand-
ing the purchase was made under the sanction of the Court of Chancery,
and an infant was interested in it. *Toulmin v. Steere*, 3 Meriv. Rep. 210.]

(g) *Shelborne v. Inchiquin*, 1 Br. Ch. Ca. 351.

(h) *Ib.* ¶ In *Read v. Bonham*, 3 B. & B. 147, notice of abandonment
given to an agent of Lloyd's at Calcutta, seems to have been considered by
the Court of Common Pleas, (dissent. Richardson, J.) as notice to the un-
derwriter, although the agent refused to accept it saying, that he had no
authority to do so. But see *Drake v. Marryatt*, 1 B. & C. 473, where
the instructions from the committee at Lloyd's to their agents are particu-
larly declared that they are not to receive notice of abandonment; and see
also the observation of the court upon the above case. ¶ Notice to the
president, cashier, agent, or other person authorized to act in the premises,
of a banking or other incorporated company, or joint stock company, or
other association, while acting within the scope of his authority is, clearly,
notice to the bank, corporation or company. *National Bank v. Nor-*
ton, 1 Hill, 578; *Fulton Bank v. New York and Sharon Canal Co.* 4
Paige, 127; *North River Bank v. Aymar*, 3 Hill, 274, 275; *Boggs v. Lan-*
caster Bank, 7 Watts & Serg. 331; and see *The Susquehanna Ins. Co. v.*
Perrine, 7 Watts & Serg. 348. Notice to an individual director of a bank

[*267]

*SECTION 3.

Effect of an Agent's Declarations or Admissions.

1. The admissions of agents concerning those transactions in which they are employed, are for some purposes

is not in general notice to the bank ; still less notice to a mere stockholder. (*Housatonic and Lee Banks v. Martin*, 1 Metc. 294 ;) but where the director is acting under some special trust or confidence, in relation to the affairs of the bank, although associated in the transaction with others, notice to him will be binding on the institution. So, where certain bills of exchange were sent to one of the directors of a bank, to be discounted for the benefit of the drawer, and the former, who was at the time a member of the board which ordered the discount to be made, received the avails, alleging the discount to be for his own benefit ; it was held that the bank was chargeable with knowledge of the fraud, and could not therefore recover upon the bills. Nelson, C. J. delivering the opinion of the court said : “ It appears that these bills were transmitted by the drawer to Williams, one of the directors of the bank, for the purpose of having them discounted for the benefit of the former ; that the director put his own name upon the paper, and procured it to be discounted for himself, and appropriated the avails accordingly ; he, at the time, being one of the five directors constituting the board which discounted the paper. His associates had no notice of the fraudulent use of the bills, and supposed the discount was made in good faith for himself. The material question which arises upon this branch of the case is, whether or not the bank is chargeable with notice of the fraudulent conduct of their director, while thus acting in the transaction of their business, as one of the members of the board.—The general rule is undisputed that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit.—Two grounds have been strongly relied on, for the purpose of taking this case out of the operation of this general rule, viz. 1. That Williams, the director, should not be regarded as acting in behalf of the bank, but for himself, while engaged in the perpetration of the fraud in getting the paper discounted ; and 2. That not being an agent with full and complete authority to discount the paper, but being only one of five constituting a board competent to do the act, the knowledge of one, or the fraudulent act of one, should not be deemed a constructive notice to the principal : in other words, that the fact must be communicated to the board—at least to a majority of the members—to bring the case within the rule. It is not true in point of fact, that Williams was not acting in behalf of the bank at the time of the transaction in ques-

equivalent to the acknowledgment of the employers themselves. Thus the acknowledgment of an agent has been held to prevent the operation of the Statute of Limitations.

tion. He was present as one of the board of directors, engaged in the business of consulting and advising with his associates in respect to the character of the paper presented, at the time, for discount; and advised, and doubtless recommended, in his character and capacity as such director, the bills in question to the favorable notice of the board. It is fairly to be inferred, moreover, as well from the facts in the case, as from the natural and probable influence resulting from his position, that the bills in question were discounted in consequence of his being and acting as such director at the time. It is no answer, therefore, to say, that Williams is not to be regarded as acting in his capacity of director in behalf of the bank, but for himself, while engaged in perpetrating the fraud; for the position is a contradiction of the obvious truth of the case. Nor is there anything novel or singular in the idea, that an agent may be guilty of fraud and deception in transacting the business of his principal; or in the law, that holds the latter responsible for the consequences to third persons. Indeed, many of the cases where the principal is charged constructively through the agent, are cases where the former has been subjected to liability, or suffered loss by reason of the fraud of the agent; as in the case of fraudulent representations, or a fraudulent concealment of material facts by the agent when engaged in transacting the business of the principal.—I agree that notice to a director, or knowledge derived by him, while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions. But in this case, as has been already observed, Williams was a member of the board, participating at the time in the discounting of bills and notes as one of the directors of the bank; and as such procured the discount of the paper in question, avowedly for his own benefit, but knowing at the time, that it belonged to Davis, one of the defendants. So far, therefore, as he may be regarded as representing the bank, in transacting its business at the board, the institution must be considered as having knowledge of the fraudulent perversion of the bills from the purpose for which they were drawn. To this extent his acts and knowledge concerning the object and ownership of the paper are to be deemed the acts and knowledge of the institution itself.—It is said, however, that Williams was but one of the five empowered by the bank to represent it in this transaction; that the bank is not therefore to be held responsible for his individual fraud at the time, nor can it be.

In one case an agent had been constantly employed to pay for work of a certain description, and the workmen

chargeable with his knowledge of the facts under which the paper in question was discounted ; and that such knowledge is chargeable only, when the agent has full power to act for the principal in the particular case. It is not to be denied, that if a principal employs several agents to transact jointly, a particular piece of business, he is equally responsible for the conduct of each and all of them, while acting within the limit and scope of their power, as completely so as he would be for the conduct of a single agent, upon whom the whole authority had been conferred. He cannot shift or avoid this responsibility by the multiplication of his agents. It is also clear, that the corresponding responsibility of each of the several joint agents to the principal, for the faithful discharge of their duties, is as complete and perfect as in the case of a single agency ; and any prejudice to the principal, arising from fraud, misconduct or negligence of either of them, would afford ground for redress from the party guilty of the wrong. One of the grounds for charging the principal with the knowledge possessed by the agent is, because the latter is bound to communicate the fact to the former, and is liable for any prejudice that may arise from a neglect in this respect ; and hence the law presumes that the principal has had actual notice. Now, the duty of any one of the joint agents is as obligatory upon him in this respect, as if he had possessed the sole power in the matter of the agency ; and any prejudice resulting from the neglect, would afford a like redress. Again ; so completely is the principal represented by the agent, while acting within the scope of his authority and employment, that the third party, for most purposes, is considered as dealing with the principal himself. In the case of a contract, it is deemed the contract of the principal, and if the agent at the time of the contract, make any representation or declaration touching the subject matter, it is the representation and declaration of the principal. Upon these views, it seems to me consistently and reasonably to follow, that in the case of a joint agency by several persons—as of the directors of a bank—notice to any one, or the acts of any one, while engaged in the business of the principal, is notice to the bank itself. The corporation is acting and speaking through the several directors who jointly represent it in the particular transaction. In judgment of law it is present, conducting the business of the institution itself ; the acts of the several directors are the acts of the bank ; their knowledge is the knowledge of the bank, and notice to them is notice to the bank.—The hardship of holding the plaintiffs responsible for the fraudulent conduct of a single director, has been alluded to ; but between two innocent parties in this case, where should the responsibility fall ? The plaintiffs appointed the director, and thus held him out to their customers and the public, as entitled to confidence. They placed him in a condition where he has been enabled to commit this fraud. It has been said, that he was the agent of Davis in procuring the discount of the paper, and not of the bank. The answer is, that

had always been referred to him ; his acknowledgment within six years of a debt due for work of that description

the bills were placed in his hands as a director and because he was one. They were placed there for the purpose of being brought before the board, that they might be passed upon in the usual and customary way of procuring accommodations. Thus far he may be regarded as the agent of Davis ; but beyond this, the action upon the bills was the action of the board, and the discount of the board, which was composed of the admitted agents of the plaintiffs." *The Bank of the United States v. Davis*, 2 Hill, 451, 461, et seq. The above decision has been cited more at length, as its authority is drawn in question, Story's Agency, 140, (b) ; where the author, in a note, quotes the language of Mr. Justice Rost, in delivering the opinion of the court in *Louisiana State Bank v. General*, 13 Louis. Rep. 525, 527, as follows: " It was proved at the trial, that the note was given in payment of land sold by Mrs. Peychaud, and was delivered to her husband, Anatole Peychaud, who had signed with her the deed of sale. That deed contains a clause, that the note upon which this action is brought, shall not be negotiated, nor the payment thereof exacted, until the property sold shall be fully released from all liabilities resulting, or to result, from certain general mortgages then existing upon it. Peychaud, being at that time a director of the Louisiana State Bank, offered the note for discount before the mortgages were raised ; was present at the board when it was acted upon ; took no part in the discount of it, and gave no information to the board in relation to the restrictions contained in the act of sale. The note was discounted for his benefit, and the defendant now contends, that he was the agent of the bank, and that the knowledge of the agent being the knowledge of the principal, the plaintiffs are to be considered as having received notice, and ought not to recover. If the knowledge of those facts had been brought home to the president or cashier, we would unhesitatingly say, that the plaintiffs were bound by it, they being the executive officers of the bank, upon whom all notices and process may be served. But directors are not officers of the bank, in the proper sense of the word, nor have they individually any power or control in the management of its concerns. They act collectively and at stated times, and have otherwise no more to do with the general management of the institution than the other stockholders. The director, in this instance, had a direct interest in suppressing the information he possessed ; and it would be extending constructive notices beyond all reasonable bounds, to say, that the plaintiffs must be held cognizant of facts, which are proved to have been intentionally concealed from them, by a person who, individually, was neither their officer nor their agent."

It must in general be assumed, that the agent possesses knowledge co-extensive with that of his principal, otherwise the principal might, through the ignorance of his agent, be enabled to commit a fraud. *M' Lanahan v. The Uni-*

was deemed sufficient on a plea of the Statute of Limitations.(a) Upon the same ground, where it was proved, in an action for goods sold and delivered, that the defendant's wife usually transacted the business, and gave orders and paid for goods, Mr. Justice Buller ruled, on an issue of *non assumpsit infra sex annos*, that a promise by her within that time took the case out of the statute; declaring, that a promise by any servant or agent entrusted to transact the defendant's business would have the same effect.(b)

[*268] *2. It is not, however, to be concluded, that the declarations of an agent have always the same force for the purpose of dispensing with proof of the fact, as the admission of the principal himself would have; though that force may always be attributed to them when they are the foundation of a contract which the agent

vercal Ins. Co. † Peters, 170. So, Lord Denman said, in *Willis v. Bank of England*, 4 Ad. & Ell. 39. "The general rule of law is, that notice to the principal is notice to all his agents; at any rate, if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question arises."—An agent employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank notes to a common carrier to be forwarded to his principals in London, which parcel was lost. The carriers had given notice that they would not be accountable for parcels containing bank notes. The agent had no knowledge of such notice, but the principals had. It was held, that it was their duty to have instructed their agent not to send bank notes by that carrier, and that the latter was not responsible. *Mayhew v. Eames*, 3 Barn. & Cress. 601.¶

(a) 5 Esp. Cas. 145.

(b) *Palethorp v. Furnish*, 2 Esp. Cas. 211.

[*Anderson v. Sanderson*, 2 Starkie's N. P. C. 204.] † Holt's N. P. C. 591; *Gregory v. Parker*, 1 Campb. 394. In *Clifford v. Barton*, 1 Bing. 199, an offer by the defendant's wife to settle a demand for goods delivered at the defendant's shop, was held admissible in evidence, on proof that the wife used to serve in the shop, and was in the habit in other instances of transacting the husband's business in his absence.‡ [But in order to render the promise binding upon the principal, it must be made by a general agent. Thus a promise made by the book-keeper of a carrier, at the office, to make compensation for the loss of a parcel, is not binding upon the carrier, unless the book-keeper be shown to be his general agent. *Olive v. Eames*, 2 Starkie's N. P. C. 181.]

has power to make. It has indeed been held, that a letter by an agent, to whom goods had been ordered by the principal to be delivered, acknowledging the delivery, is sufficient evidence of that fact.(c) But the authority of that decision has been questioned, and Lord Kenyon is said to have ruled the contrary in subsequent instances (d)

The distinction between those cases in which the declarations of agents affect the principal, and those where other evidence is necessary, has lately been discussed very much at large in the *case of *Fairlie* against [*269] *Hastings*. In that case the fact sought to be established was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of; and in proof of this fact the plaintiff went into evidence of repeated applications to the defendant's agent for the bond, who informed him that it had been delivered to the defendant. The Master of the Rolls thought that this did not amount to evidence of the fact stated, and delivered his opinion in these terms :(e) "As a general proposition, what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declaration.(A) An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to the agreement. Therefore if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or

(c) *Biggs v. Lawrence*, 3 T. R. 454.

(d) Arg. *Bauerman v. Radenius*, 7 T. R. 665; and post, p. 270. || And see the remarks of Dallas, C. J. in *Betham v. Benson*, Niel Gow, 45, who assumes that the case of *Biggs v. Lawrence*, had been disapproved of by Lord Kenyon. Mr. Russell, Fact. & Brok. 92, who, however, has not noticed the last cited case, considers that it is still a *vexata quæstio*.||

(e) *Fairlie v. Hastings*, 10 Ven. Jun. 123.

(A) || Ante, 256, n. (1)||

representation. So with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party therefore to be [*270] bound by *the act must be affected by the words.

But, except in one or other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been his agent. If any fact material to the interest of either party rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding that the agent himself must be examined (*Maesters v. Abram.*) If the agreement were contained in the letter, I should have thought it sufficient to have proved that letter written by the agent: but if the letter were offered as proof of the contents of a pre-existing agreement, it was properly [*271] rejected.”(1) This doctrine was discussed *inci-

(1) [In the cases of *Langhorn v. Allnutt*, 4 Taunt. 511, and *Kahl v. Jansen*, *ibid.* 565, the Court of Common Pleas decided, that the letters of an agent abroad to his principal, containing a narrative of the transactions in which he has been employed, were not admissible in evidence against the principal, as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also *Reynier v. Pearson*, *ibid.* 662. In his judgment in the case of *Langhorn v. Allnutt*, Gibbs, J. states, and recognizes the general rule. “When it is proved,” said that learned judge, “that *A.* is agent of *B.*, whatever *A.* does, or says, or writes in the making of a contract, as agent of *B.*, is admissible in evidence, because it is part of the contract which he makes for *B.*, and therefore binds *B.*; but it is not admissible as his account of what passes.”

dentally in *Bauerman v. Radenius*, (7 T. R. 663,) and in that case there is reference to another, *Biggs*

And it matters not whether the fact stated be true or false, because the declaration of the agent is not admitted in evidence for the purpose of establishing the truth of the fact, but as a representation, by which the principal is as much bound as if he made it himself.] ¶ The general rule is this: when it is proved that one is the agent of another, whatever the agent does or says, or writes at the making of a contract as agent, is admissible in evidence against the principal; but what the agent says or writes afterwards, is not admissible. Per Rogers, *J. Hough v. Doyle*, 4 Rawle's (Pa.) Rep. 294. Notwithstanding the agent may himself be a competent witness in the case, his admissions while acting within the scope of his authority, and in reference to the *res gestæ*, are evidence against his principal. *Baring v. Clark*, 19 Pick. 220. Where a broker makes a sale in the usual course of his business, his representations bind his principal, although they are made contrary to the principal's express instructions, unless such instructions are known to the purchaser. *Lobdell v. Baker*, 1 Metc. 193.

In *Betham v. Benson*, Niel Gow, 45. Dallas, C. J. says: "In all cases of this description, there are two things to be considered. First, what is the evidence offered, and next to what is it to be applied. The object with which the evidence in this case is offered, is, to establish through the medium of an agency, a tender of the ship to the East India Company, and to fix that tender upon the defendant. The evidence offered to establish this fact, is a letter written by an agent; and the question is, whether that letter is, or is not admissible. It is not true that where an agency is established, the declarations of the agent are admitted in evidence, merely because they are his declarations; they are only evidence, when they form part of the contract entered into by the agent on the behalf of his principal, and in that single case they become admissible. The declarations of an agent, at a different time, have been decided not to be evidence; indeed, the cases on the subject draw the distinction between the declarations of an agent accompanying the making of, and therefore forming a part of the contract, and those declarations that are made either at a subsequent, or an antecedent period." That the admissions or declarations of an agent, in order to bind the principal, must be connected with, or form part of the *res gestæ*; and that what may be said by the agent either before, or subsequently to the time of the concoction of the contract, is not evidence against the principal, unless the agent was acting within the scope of his authority, at the time such declaration was made; see further *Lee v. Munroe*, 7 Cranch, 366; *Leeds v. The Marine Ins. Co. of Alexandria*, 2 Wheat. 360; *Hubbard v. Elmes*, 7 Wend. 446; *Bank of the United States v. Davis*, 2 Hill, 464; *North River Bank v. Aymar*, 3 Hill, 262; *The New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56, 62; *Clark v. Baker*, 2 Wharton's Rep. 340; *Stockton v. Demuth*, 7 Watts, 39; *Hannay v. Stewart*, 6 Watts, 487; *Robinson v. Morgan*, Littel's (Ky.) Select Cas.

v. *Lawrence*, (f) in which Mr. Justice Buller held, that a receipt given by an agent for goods, directed to be delivered to him, might be read in evidence against the principal. The counsel, in *Bauerman v. Radenius*, state that the contrary had frequently since been held by Lord Kenyon at Nisi Prius, without its ever having been questioned. That statement does not appear to have been denied upon the other side, and seems to have been acqui-

56; *McClure v. Purcell*, 3 A. K. Marshall's (Ky.) Rep. 63; *Reynolds v. Rowley*, 3 Robinson's (La.) Rep. 301; *Stewartson v. Watts*, 8 Watts, 392; *Bank of the Northern Liberties v. Davis*, *infra*.

Declarations of an agent, made at the time of paying money, showing on whose account and behalf the money was paid, are admissible in evidence as part of the *res gestæ*. *Levering v. Rittenhouse*, 4 Wharton's Rep. 130. In an action against a bank, declarations by the cashier or teller, respecting the genuineness of certain checks purporting to have been drawn by the plaintiff, made at a period subsequent to their presentation, are inadmissible to affect the defendants. Rogers, J. "Declarations and admissions of agents or trustees of a corporation in their official capacity, are evidence against those whom they represent, if made in the regular transaction of their business; but if not so made, they are not evidence. *Magill v. Kauffman*, (4 Serg. & Rawle, 317) It has also been ruled, that in an action by a bank, evidence of the parol declarations of the officers of the bank, is not admissible for the defendant, without proof of the particular officer's being authorized by the board of directors to speak for them, even though it should appear that the board kept no regular minutes of their transactions. *Stewart v. The Huntingdon Bank*, (11 Serg. & Rawle, 267.) So, declarations of a person who has been president of a bank, respecting payment made on a note, are not evidence in an action by the bank upon the note. 11 Serg. & Rawle, 179. The cases are based on this principle, that what an agent says, does, or writes, at the time of making a contract, or when engaged in the discharge of his duty as agent, are admissible against the principal; but what the agent says, or writes afterwards, is not admissible. *Hough v. Doyle*, (4 Rawle, 294.) The declarations given in evidence were not made at the presentation of the checks, but afterwards, when they [the cashier and teller] had no authority that I can discover, to make them. Such a power does not come within the general scope of the duty of either, nor is such an authority necessary in the discharge of that part of the business of the bank over which they have the control." *Bank of the Northern Liberties v. Davis*, 6 Watts & Serg. 285, 289.¶

(f) Ante, 268.

esced in by Lord Kenyon, who said, "that was not the point upon which the case was argued and determined;" *meaning the point that such a receipt [*272] could be admitted in evidence.

The case above alluded to, of *Maesters v. Abram*, as having been decided by Lord Kenyon, was an action on a sale of bark by the plaintiff to the defendant; and it being a question which party was to supply the bags, a letter from the defendant's broker, subsequent to the contract, was rejected as evidence of the defendant's having undertaken to do so, and it was required that the broker himself should be examined.(g) But it is material to observe, that the letter was not cotemporary with the contract; for if it had been, it may be collected, from what has already been observed, that it would have been binding as part of the agreement.(h) A distinction may be supposed to subsist between such declarations as are merely assertions of the agent, and such as are admissions of the principal made through the medium of his agent. A letter written by a clerk, whose business it was to correspond in the name of his employer, may therefore be considered as if written under the inspection of the principal, and as such entitled to the same weight as if coming immediately from him. Thus, in an action of trover for a policy of insurance, a letter written by the defendant's clerk, informing the plaintiff that the policy was effected, was deemed *sufficient evidence of its existence, though it was [*273] proposed, on the other side, to prove that the letter was written by mistake, and that in fact the policy had not been made, which was refused.(i)

(g) 1 Esp. Cas. 375.

(h) Ante, p. 270.

(i) *Harding v. Carter*, Park. 4. ¶ The agents of the defendants, by their order, received money on their account, and stated the fact in a letter to them. They replied, acknowledging the receipt of the letter of the agents, and giving them directions as to the disposition of the money. It was held, that the letter of the agents, coupled with that of the defendants, was admissible in evidence to charge the defendants with the receipt of the

‡ On the principle laid down in *Fairlie v. Hastings*, were decided the late cases of *Drake v. Marryatt* and *Garth v. Howard*. In the former a certificate of sea-damage, granted by an agent of Lloyd's abroad, was not admitted as evidence against the defendant, an underwriter and a member of Lloyd's, on the ground that the granting of the certificate was beyond the scope of the agent's authority.⁽²⁾ The other was an action of detinue for plate of the plaintiff pledged to the defendant, a pawnbroker. The only evidence of possession by the defendant was a declaration of his *shopman* that "it was a hard case, for his master had advanced all the money on the plate at five per cent." The evidence was received, subject to motion; and on argument the court were of opinion that it was inadmissible, on the ground that the transaction was not in the usual course of the defendant's business as a pawnbroker, but a common loan at legal interest, secured by a deposit of plate, and consequently that the declaration of
 [*274] the shopman related to a *matter which was not in the course of his employment as shopman.^{(3)‡}

SECTION 4.

Payment to and Receipts by Agents in general.

If money be due upon a *written security*, it is the duty

money. Best, C. J. "The letters written by the agents would not have been admissible, unless they had been written by the agents while acting within the scope of their authority, upon a matter entrusted to them by their principals. The letters of these agents were written under these circumstances; the principals have adopted what was done by their agents, and having upon the faith of their assertion, taken credit for the sum named in those letters, the letters were properly received in evidence." *Coates v. Bainbridge*, 5 Bing. 58.||

(2) 1 B. & C. 473.

(3) ‡ 8 Bing. 451; || S. C. 5 Carr. & Payne, 346.|| This decision seems to be rather a refinement; but Tindal, C. J. observed, that hearsay evi-

of the debtor, if he pay it to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor.(a) And even the agent being usually employed in the receipt of money does not, in this instance, constitute such an authority as will secure the debtor. It has been so held in respect to money paid upon a bond, to one who usually received money for the obligee, but who had not the custody of the bond in question.(b) And even where the obligor had for several years paid the interest, and part of the principal, to an agent of the lender through whom the money had been *borrowed, who had [*275] not the possession of the bond, but had regularly paid the money over to the obligee, except the last payment; the obligor was adjudged to pay the last sum over again. For it was held, notwithstanding the hardship of the case, that the circumstance of the agent's having before received the interest, and part of the principal, did not imply that he had any authority to receive it; but as long as he paid it over all was well, and any one else might have paid it to the party as well as he.(c)

But perhaps a special authority from the obligee might be shown, which would be sufficient without possession of the security.(d)

If the bond remain in the hands of the agent, that circumstance is evidence of the obligee's intention to trust him with the receipt of the principal and interest, and therefore a payment to him discharges the obligor.(e) And

dence of such a nature ought always be kept within the strictest limits to which the cases have confined it.

(a) *Hen v. Caisby*, 1 Chan. Cas. 93, note.

(b) *Gerard v. Baker*, 1 Chan. Cas. 94; *D. of Cleveland v. Dashwood*, 2 Eq. Ca. Ab. 709.

(c) *Wostenholme v. Davies*, 2 Freem. Rep. 289.

(d) *Id.*, and 2 Eq. Cas. Ab. 709, in marg.

(e) *Whitlock v. Waltham*, 1 Salk. 157; *Duchess of Cleveland v. Dash-*

if the obligee keep the bond himself, but upon the money being paid to the agent delivers him the bond for the purpose of its being delivered up to the obligor, he cannot afterwards recall it from the agent, and put it into [*276] suit ; although, by reason of the *agent's insolvency, the principal never receives the money.(f)

The production of a bill of exchange or promissory note is in general sufficient to warrant the payment to the person who produces it.(g) And this without reference to the circumstance of his being the habitual agent of the same party.(h) But the presumption of authority from the possession of the instrument may be repelled by evidence of its being obtained by fraud, or for some other special purpose than receiving payment.(i)

2. With respect to debts not arising upon written securities, the authority of an agent to receive payment depends upon the same general principles as those which apply to other acts. In general it may be remarked, that payment to an agent properly authorized is equivalent to payment to the principal, in equity as well as in law.(k) [*277] And *the fact of the authority may be proved by the agent himself.(l) But it may be proper to con-

wood, 2 Eq. Ca. Ab. 709 ; but otherwise of a mortgage deed, upon which only the interest can be received by the agent, but not the principal, *id. ib.*

(f) *Abington v. Orme*, 1 Eq. Ca. Ab. 145.

(g) *Owen v. Barrow*, 1 Bos. & Pull. N. R. 103, per Mansfield, C. J. ; *Anon.* 12 Mod. 564.

(h) *Anon.* 12 Mod. 564 ; and see 2 Ld. Raym. 930.

(i) *Post*, 289.

(k) 7 Ves. Jun. 470, and *post*, 277. In *Fenton v. Browne*, 14 Ves. 144, on the sale of an estate, the deposit was paid to the vendor's agent. The vendee, pending a dispute about the title, applied to have the deposit paid into court, which the vendor resisted ; and afterwards the agent failed. By the Master of the Rolls—"Without entering into the general question, the vendor's refusal to concur in the proposition made to pay the deposit into court throws the risk upon him, and he must bear the loss."

(l) 7 T. R. 480 ; Dr. & St. 286. || See more fully as to this position, *post*, 319.|| Payment to an attorney in a cause is in general sufficient, even after a private countermand, 1 Bl. Rep. 85 ; but if the attorney derived his authority under a forged power from the supposed plaintiff, payment

sider more particularly the effect of payments to factors and brokers, observing that the principles which govern these may generally be applied to agents of all descriptions.(A)

SECTION 5.

Payment to Factor or Broker.

The effect of payment to, or set-off against, a factor or broker personally in discharging a debt due to the principal, may be considered under the following different circumstances. 1st, Where the agent is known to act merely as the representative of another, and no notice given by the principal to withhold payment. 2d, Where, under the like circumstances, that notice is given. 3d, Where he is permitted to treat as principal.

*1. Payment to a factor in the course of his business, and without notice from the principal, in general discharges the debtor ;(a) if the usual mode of

to him does not discharge the defendant, though he be the attorney upon record, 1 T. R. 62. Payment to the country agent, employed by the attorney on record, does not discharge the debtor ; at least without production of the security. *Yates v. Freckleton*, Doug. 690. An agent in town, however, by taking money out of court, binds the plaintiff, though the payment into court were irregular, and notice had been given by the plaintiff's attorney to the defendants that he should not take it out, 1 T. R. 710.

(A) || A person who pays money to another, who is authorized to receive it by a power of attorney, is not entitled to keep possession of the power of attorney. *Pridmore v. Harrison*, 1 Carr. & Kir. 613. As to payment to agent after death of principal, see ante, 186.||

(a) Cowp. 256 ; 2 Camp. N. P. C. 24. || " If he [the agent] had authority to sell goods, so had he, in the absence of advice to the contrary, an implied authority to receive the proceeds of such sale. The plaintiffs cannot avow the acts of their agent, as to one part of the transaction, and repudiate them as to another part." Lord Tenterden, *Capel v. Thornton*, 3 Carr. & Payne, 332. Payment to a sub-agent will sometimes bind the

dealing warrant such payments, which is a question purely of fact. Therefore where goods had been sold by a broker (without naming the principal) to be paid "in one month, money," as it was expressed in the sale notes, and the vendee paid the broker within the month by bills which had to run beyond the month, but which he discounted immediately, the Court of King's Bench, on a motion for a new trial after a verdict obtained by the principal against the vendee, sent the case to be tried a second time, for the purpose of having it referred particularly to the jury to say whether this was a payment in the usual course of trade. And the jury, consisting of merchants, accordingly found it to be so, and consequently binding upon the principal. And though the plaintiff obtained a rule for a new trial upon a doubt whether the payment was meant to be wholly applied to the plaintiff's demand, the finding of the jury was deemed conclusive as to the part which was so applied.(b) It should, however, be observed, that if the vendee pay money to the broker on a general account, having purchased from him goods of different owners, he [*279] *cannot, upon failure of the broker, apply the whole to one demand, but it must be apportioned among the several principals; and he remains liable to each for the surplus, if the sum paid were not sufficient to cover all the demands.(c)

‡ Payment to a known agent entrusted with the possession of goods, made in the usual and ordinary course of business, was at common law binding on the principal, unless made after countermand; and it is now expressly declared to be so by the 3d section of 6 Geo. 4, c. 94, which has been already cited.(1) That a mere depositary to keep, as a wharfinger, is not such agent as is contemplated by

agent, so as to make him responsible to his principal, for any loss of the money in the hands of the sub-agent. *Taber v. Perrott*, 2 Gallis. 565.¶

(b) *Favenc v. Bennet*, 11 East, 38.

(c) *Favenc v. Bennet*, 11 East, 38.

(1) ‡ Ante, p. 223.‡

the act, is obvious, and has been decided.(2) But there is a material distinction between the character of a factor and that of a broker.(3) The latter, when selling for a known principal, has not, in general, authority to receive payment ; and if payment be made to him, it is at the risk of the purchaser.(4)

A fortiori, therefore, a broker has no authority, after the completion of the contract, to vary the terms of it, and cannot bind his principal by *receiving pay- [*280] ment in any other mode than that which was originally stipulated.(5)

Nevertheless, if the principal have in other transactions with the same purchasers sanctioned a settlement with the broker, he will be presumed to have authorized it in the particular instance, and will be bound by it.(6)

But if he act for a principal *undisclosed*, he has authority to receive payment, and may even, it has been said, vary the terms of payment after the sale is completed, subject

(2) † *Monk v. Whittenbury*, 2 Moody & M. 81.†

(3) † *Baring v. Corrie*, 2 B. & A. 137.† || Ante, 13, n. (A).||

(4) † *Ibid.*† || It seems, that an auctioneer, selling real estate, is not authorized to receive the purchase money, further than the deposit. In a case at Nisi Prius, Sir J. Scarlett, for the defendant, alleged that ; “ In general, an auctioneer has by the conditions of sale an authority to receive the deposit only ; he has no authority to receive beyond that.” Littledale, J. does not deny the position, and observes ; “ I think that an agent employed to sell, has no authority, as such, to receive payment.” *Mynn v. Joliffe*, 1 Moody & Roh. 326. The rule certainly cannot apply to ordinary sales of goods and chattels at auction. Daily experience contradicts it. An auctioneer may maintain an action in his own name, for the price of goods sold. Post, 362. *A fortiori*, he has a right to receive payment.||

(5) † *Blackburn v. Scholes*, 2 Camp. 343.† || “ A broker has, in general, no authority as such, to receive payment for goods sold by him on account of his principal ; but if the custom of trade, or the usual course of dealing between himself and his principal warrant him so to do, he may receive payment for goods so sold. Even in these cases, however, he must, like a factor, receive payment in the usual way ; and he has no power to vary the terms of payment after the bargain is completed.” Russ. Fact. & Brok. 68.||

(6) † *Townsend v. Inglis*, Holt, N. P. C. 278.†

however to the right of the principal to interfere at any time before payment, and to rescind what has been done; "for until the principal appears, the broker is to be regarded as the proprietor."(7)

The latter branch of the proposition, however, must be considered doubtful; for in a subsequent case, where brokers acting for undisclosed principals had received payment in a mode varying from the terms of the original contract, without authority from those principals to make the substitution, Lord Ellenborough considered it ineffectual as against the principals, and peremptorily refused to receive evidence of a usage of trade sanctioning such an alteration, observing, "that it would be productive of intolerable mischief to *permit brokers to deviate from the original terms of the contracts."(8)

An insurance broker has authority from the assured to adjust and receive payment of a loss. But he has no authority to settle on any other terms than those of payment *in money*, and consequently if the settlement has been made by a set-off in general account with the underwriter, the assured is not bound by such settlement, and may, notwithstanding, call upon the underwriter for the amount.(9)

Still in this, as in other cases, if the assured has given a general authority to the broker to settle in such way as he

(7) † Per Lord Ellenborough in *Blackburn v. Scholes*, *supra*.†

(8) † *Campbell v. Hassell*, 1 Stark. N. P. C. 233.† || *Kingston v. Kincaid*, 1 Wash. C. C. Rep. 454; post, 290.||

(9) † It has been already said (ante, p. 111, n. 3), that the premiums are a debt due from the broker *personally* to the underwriter.† || As to the authority of an insurance broker, see further ante, 191. If an insurance broker keep the policy in his hands, he will be presumed to promise that he will collect the sums due from the underwriters upon a loss happening, in consideration of the commission he receives for effecting the insurance. If he choose to part with his lien, he may hand the policy over to his employer as soon as it is effected, and then his responsibility will be at an end; but if he retain it, he is bound to use reasonable diligence to bring the underwriters to a settlement of the loss, according to the usage of trade in this respect. *Bonsfield v. Creswell*, 2 Campb. 545; 1 Liv. Pr. & Ag. 356; Russ. Fact. & Brok. 35.||

pleases, or has in former instances recognized and adopted such a mode of payment, he cannot in the particular case repudiate the settlement. A mere usage, however, among underwriters, by which a settlement of losses by set-off against premiums due from the broker is deemed good payment, cannot bind the assured unless he has assented to the usage; and although several attempts have been made to import the practice at Lloyd's in this particular into the law merchant of England, the courts have invariably refused to adopt it as obligatory *on persons not [*282] shown to be themselves members of that body, or cognizant of its laws.(A)

The first case of this kind was that of *Todd v. Reid*,⁽¹⁰⁾ in which the court disposed of the argument drawn from usage in the following summary judgment: "The broker, as agent of the assured, was only entitled to receive payment in money; and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another."

The attempt was renewed soon afterwards in the case of *Russell v. Bangley*,⁽¹¹⁾ and the usage of Lloyd's was again pressed on the consideration of the court; but as it appeared in that case, that the name of the underwriter had not been struck out from the policy on the supposed settlement, the court took hold of that circumstance as decisive against the defendant, leaving the question upon the

(A) || As to usage. See ante, 5, n. (A); *Read v. Rann*, 10 Barn. & Cr. 438.||

(10) † 4 B. & Ald. 210.† || It is a mistake that this, was the first case of the kind. In *De Gamind v. Pigou*, 4 Taunt. 246, it was held, that in an action against an underwriter for a loss, he cannot set-off premiums due to him from the broker, unless he can make it appear, that the state of the relative accounts between the assured, the broker, and himself, is such as to take the case out of the ordinary rule, namely,—that the receipt of the underwriter for the premium is conclusive evidence for the assured, that the premium has actually been paid to him. See *Russ. Fact. & Brok.* 108.||

(11) † *Ibid.* 395.†

usage altogether undetermined. "The general rule of law," it was observed by Chief Justice Abbott, "is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged. In cases of insurance, *usage* [*283] *may possibly introduce a different rule*; but at all events, an underwriter has never been considered discharged as against the assured until his name has been struck off the policy."

The qualification thus cautiously expressed, encouraged the underwriters to make a third effort in the case of *Bartlett v. Pentland*,⁽¹²⁾ the defendant in which was the secretary of an Irish insurance company. Lord Tenterden in his judgment in that case thus expressed himself: "The authority given by the principal to his agent to receive money can never be construed into an authority to allow the debtor, instead of paying the money, to write off so much as may be due to the agent, for that would be to enable the debtor to defraud the principal by collusion with the agent. And if he be not authorized to allow a set-off, neither can he be authorized to strike the name off the policy, or, in other words, to do that which amounts to a release of the debt. It is said, that in *Russell v. Bangley*, I relied very much on the fact of the name not being struck off the policy; and, certainly, there may be cases in which such a circumstance would be important; as where it can be fairly inferred that it was done with the consent or acquiescence of the assured. Here, however, there was nothing on which such a presumption could be founded. As to the supposed usage of Lloyd's—of a particular [*284] place, and a particular class of persons, however respectable—I do not know how that can be binding on third parties, unless shown to be acquainted with

(12) † Lloyd & Welsby, 235; 10 B. & C. 760.†

that usage." The same point was again mooted in the case of *Scott v. Irving*, (13) and was again solemnly decided by the court against the underwriter.(A)

(13) 1 B. & Ad. 605.

(A) || An action was brought by the assured on a policy of insurance, to recover from one of the underwriters the amount of his subscription. The defendant pleaded, amongst other things, that at the time the loss was adjusted, D. & Co. the brokers of the plaintiff, were indebted to him, the defendant, in a larger sum of money than the amount at which the loss had been settled, and that, by the authority and with the sanction of the plaintiff, the brokers accepted a credit on account with the defendant as a payment of the said sum, and made themselves liable to the plaintiff for the same, and that he, the plaintiff, discharged the defendant therefrom. In a second plea, the defendant set forth the custom between the brokers and underwriters in London, to make these settlements in account by way of payment; and alleged, that the plaintiff had knowledge of that custom, and had assented to it, and that the settlement was made accordingly. It appeared in evidence that the plaintiff resided in Liverpool, and that he had for several years employed D. & Co., as his brokers for effecting insurances in London. On the trial several brokers were called, who stated the usage at Lloyd's to be as pleaded, and it was also stated by some of them, that the said usage was well known in Liverpool, as well as in London. Lord Abinger in summing up to the jury, expressed his opinion that the notion had been pushed too far about the actual payment in cash; and that it appeared to him, that if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal, whether there is an interchange of bank notes, or a mere transfer of accounts from one side to the other; and that it is equally a payment, if it is done without fraud. He however left the whole facts to the jury, and directed them to consider, whether parties effecting insurance for their own benefit through an agent, must not know what is the habit of dealing between the broker and underwriter; and whether the authority to settle must not mean, that the broker should settle in the same way as is the custom to settle with underwriters. The jury found a verdict for the defendant, and the Court of Exchequer refused a rule for a new trial:—they being of opinion, that there was at least sufficient evidence to prove the defendant's first plea, and that it was an answer to the action; because "where an insurance broker, or other mercantile agent, has been employed to do work for another in the general course of business; and where the known general course of business is, for the agent to keep a running account with his principal, and to credit him with sums which he may have received by credits in account with the debtors,—with whom he also keeps running accounts,—and not merely with moneys actually received; it must be understood that where an account is *bona fide*

In the last case payment had been made partly in cash ; but the usage being that payment should be made at the expiration of a month, the assured insisted that this payment, having been made within the month, was irregular and unauthorized, and consequently not binding upon him. But the court rejected this part of the claim, on the ground that a broker had, in virtue of his general authority, a right to receive payment *in money* at any time ; and they distinguished the case from the one before cited of *Campbell v. Hassell*, observing, that there the payment was in direct contradiction to the original contract.(14)

However, even a payment in cash to the broker will not be available against the principal, unless it were specifically applied to the particular debt. Payment on general [*285] account will not be sufficient, *unless the principal has by his own default or delay, placed the underwriter in a worse situation with the broker than he would otherwise have been in.(15)†

2. By the general rule of law, the sale of a factor creates a contract between the buyer and the principal, and there-

settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention, and with the authority of the principal." *Stewart v. Aberdeen*, 4 Mees. & Wels. 211, 228. Russ. Fact. & Brok. 111.

Where a broker in whose name a policy of insurance under seal was effected, brought an action of covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker, by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record, and the defendants ; and therefore an answer to the action. *Gibson v. Winter*, 5 Barn. & Ad. 96.¶

(14) † Ibid. This decision seems, it must be confessed, somewhat inconsistent with the *dictum* of Bayley, J., in *Parnther v. Gaitskell*, 13 East, 437, that " if a purchaser pay his money to the agent of the vendor, before the time when the latter is authorized to receive it, he makes that agent his own, for the purpose of paying over the money to the right owner."†

(15) † *Bartlett v. Pentland*, *supra*. † §283.¶

fore, in general, the buyer, *after notice* from the principal not to pay the factor, is not justified in doing so.(d) But to this there are exceptions ; 1st, Where the factor or broker acts under a *del credere* commission, and the buyer gives credit to him only, as in the following case, in which, notwithstanding the rule as above laid down by C. J. Lee, (and said to have been since ratified(e) by Mr. J. Buller,) a special jury of merchants persisted in finding a verdict in favor of a buyer who had paid the factor after notice ; alleging as their reason that no credit was given, as between the owner and the buyer, and that the latter was answerable only to the factor, and the factor to the owner.(f) However it may be observed that the opinion of the jury is not altogether irreconcilable with the truth of the *doctrine laid down by the Chief Justice, considered as a general position, for it forms [*286] part of the case, that the factor sold at his own risk ; and Mr. J. Buller, treating of this case, says,(g) “ Perhaps, under some particular circumstances, the rule there laid down may not take place : as where the factor sells the goods at his own risk, i. e. is answerable to the owner for the price, though it be never paid, for in such case he is the debtor to the owner, and not the buyer.” That the circumstance of a *del credere* commission forms an exception to the rule, is also confirmed by a more recent opinion ;(h) but this point does not appear to have been expressly decided.

[However in the case of *Morris v. Cleasby*,(16) this question came directly under the consideration of the Court

(d) Str. 1182 ; Bull. N. Pr. 130 ; [*Mann v. Forrester*, 4 Campb. 60, S. P.] || *Corlies v. Cumming*, 6 Cowen, 186. ||

(e) *Escot v. Milward*, Co. Bl. ; 1 Esp. N. P. 107 ; but see 7 T. R. 360, where it is affirmed that this case appeared, from a note obtained from Mr. Justice Buller, by whom it was tried, to have been decided on the ground of fraud.

(f) *Scrimshire v. Alderton*, Str. 1182.

(g) Ni. Pri. 130.

(h) Of Mr. Justice Chambre, 3 Bos. & Pul. 489.

[(16) 4 M. & S. 566.]

of King's Bench, and in the previous case of *Cumming v. Forrester*,⁽¹⁷⁾ (the judgment in which was put on another point,) that court had intimated their opinion upon the question. In the former case it was decided, in consonance with the opinion intimated in the latter, that a *del credere* commission, being a contract between the broker and his own immediate employer, could not affect or vary the rights of a third person, who was not privy to [*287] the contract, *nor empower the broker to set up a claim against the person dealing with his principal, as derived out of that contract.](18)

Again; even *after notice*, and notwithstanding the buyer was apprized at the time of the contract that he was dealing with an agent, yet he will be secure in paying the factor, if the principal upon the general balance of his account be indebted to the factor. For since the factor would have a lien upon goods in his hands for his general balance, he is allowed, for the benefit and ease of trade, to have the same lien upon the price of the goods when sold.⁽ⁱ⁾ This was established in an action brought by the assignees of a bankrupt principal against the buyer of goods from the factor, who, notwithstanding his knowledge of the factor's character at the time of sale, after the action brought, paid the price to the factor, who was proved at the trial to have a balance of accounts in his favor to the amount of the money so paid. Upon that proof the defendant obtained a verdict in his favor, which was confirmed by the opinion of the Court of King's Bench, upon the ground that payment to a factor having a lien is a discharge.^(k) † And on the same ground a purchaser will be warranted in paying to a factor so circumstanced, [*288] even *after an act of bankruptcy committed by the principal; because, as was well observed by Mr.

[(17) 1 M. & S. 494.]

(18) † Ante, p. 111, n. 3.†

(i) Ante, c. 2, *ad finem*, ¶ p. 147.¶

(k) *Drinkwater v. Goodwin*, Cowp. 251.

Justice Bayley, although the bankruptcy would undoubtedly operate as a countermand of his authority to receive the price *on account of his principal*, yet it does not operate to destroy his right to receive it *on his own account in respect of his lien*.⁽¹⁹⁾† The debtor however by paying the factor after notice, takes upon himself to make out the factor's right to receive it.^(l)

3. If the principal allow the broker to deal with goods as if he were the principal, payment to him discharges the debt of the buyer. As where goods were consigned to a broker in London, from an out port, to be sold, who sold them to be paid for on delivery, he appearing in the business as a principal, and it being known to the owners that he usually dealt in that way, the buyer was held to be discharged by payment to him.^(m) ‡ This subject underwent much consideration in the case of *Baring v. Corrie*,⁽²⁰⁾ from *which the following result may be [*289]

(19) † *Hudson v. Granger*, 5 B. & Ald. 27.‡ [The factor however should give the buyer notice of his lien, and require him not to settle with the principal, since, otherwise, a payment to the principal would operate as a discharge to the buyer. *Coppin v. Walker*, 2 Marsh. 497. 7 Taunt. 237, S. C.]

(l) Cowp. 255, per Lord Mansfield. ¶ The general rule is, that a factor's sale creates a contract between the owner and the buyer, and where a factor having sold upon credit, the owner or principal gives notice of his interest and claim to the buyer before payment, and requires him not to pay the factor, the buyer will not be justified in afterwards paying the factor. And this rule applies whether the factor has, or has not named his principal at the time of the sale.—There are exceptions to this rule; as where the factor sells in his own name, being himself responsible for the price of the goods sold, whether collected or not; or where he sells them to his own creditor where there are mutual dealings. The principal cannot in those cases, interfere to the prejudice of the party dealing with the factor, without any knowledge of his agency; and only the balance, if any be due to the factor, may be reclaimed by the principal." Sewall, J. *Kelly v. Munson*, 7 Mass. Rep. 324.¶

(m) *Coates v. Lewes*, 1 Campb. N. P. C. 444.

(20) † 2 B. & A. 137. It was a claim of set-off, and will be adverted to more particularly hereafter. It serves, however, to illustrate the subject now under consideration. Indeed there is great difficulty in separating the

obtained. Where brokers accustomed to act both in that capacity and as principals, make a contract of sale in such a manner as to make it probable that they are acting in the former character, payment to them under such circumstances would be made at the risk of the purchaser; because, if misled, it is the consequence of his own neglect in not making such inquiries, as would have led to a correct knowledge of the facts. If the principal has conferred on the broker the *indicia* of property, then of course, having enabled him to mislead, he must abide the consequences; but if he has employed him merely as a broker to make the sale, he is not, and ought not to be a sufferer for a breach of that confidence which, by the necessities of trade, every merchant is compelled to place in his broker.†

Wherever payment to an agent would be sufficient, where he is authorized to receive it, a *tender* to him has the same effect as a tender to the principal in person.(n)
(21)

subject of payment to, and set-off against a factor or broker; and in this instance, as in others, the method and division adopted by the author are productive of some inconvenience and confusion.†

(n) *Goodland v. Blewith*, 1 Campb. 477. (See also *Muffat v. Parsons*, 1 Marsh. 55; 5 Taunt. 307. S. C.)

(21) But a tender *by* an agent does not discharge the principal without actual payment. Thus, where the maker of a promissory note paid money into the hands of an agent to retire it, and the agent tendered the money to the holder of the note, on condition of having it delivered up, but the note being mislaid this condition was not complied with, and the agent afterwards became bankrupt with the money in his hands; it was holden that the maker still continued responsible on the note. *Dent v. Dunn*, 3 Campb. 296.]

|| If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender, unless the attorney disclaims his authority at the time; and, if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office, (the attorney being absent) is good. Lord Tentarden. "If I were to hold, that a tender to an attorney who had authority to write for payment, (he not disclaiming his authority at the time,) was not a good tender, defendants would be deluded, as they would not think it necessary to

*SECTION 6.

[*290]

Authority of Agent to discharge, compound or release Debts.

1. An agent who has a general authority to receive payments, which is a matter of evidence, may, without collu-

go to the plaintiff and make a tender to him. And if the attorney is absent from his office, I shall hold that he is bound by the acts of those persons whom he allows to represent him in his office." *Wilmot v. Smith*, 3 Carr. & P. 453. The plaintiff, a creditor, instructed his clerk, who was in the ordinary habit of receiving moneys for him, that if the money was offered, he should not receive it; and he stated to him that he had put the matter into the hands of his attorney. A tender was then made, on behalf of the defendant, to the plaintiff's clerk, who, in the absence of the plaintiff rejected it, saying, the matter was put into the hands of an attorney. There was a verdict for the plaintiff; but on the case coming up on a question reserved, judgment was rendered for the defendant; Heath, J. delivering the judgment of the court, observing,—“ Upon the principle that *qui facit per alium, facit per se*, the tender to the servant was a good tender to the master, therefore, there must be a judgment for the defendant." *Moffat v. Parsons*, 5 Taunt. 307. In *Kirton v. Braithwaite*, (1 Mees. & Wels. 310,) it appeared that the plaintiff's attorney before bringing the action, wrote to the defendant to say, that unless the debt, together with his (the attorney's) charge for that letter were paid at his office on the Wednesday following at 12 o'clock, proceedings would be commenced. On the Wednesday at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy to whom he tendered the amount of the debt only. The boy, after referring to the letter book, refused to accept it, unless the charge for the letter were also paid; and the writ was issued at 11 o'clock, on that day;—It was held, that this was a good tender." And see *The Commercial Bank of Buffalo v. Kortright*, 22 Wend. 351. 3 Steph. N. P. 2601. Where a debtor sent money to the house of his creditor, and his servant took it in, and returned it with an answer purporting to be from his master, that he would not receive it, but that the defendant must go to his attorney, this was considered evidence to be left to the jury, from which they might infer that a tender was made. *Anon.* 1 Esp. N. P. C. 349. And see *Hayward v. Hayne*, 4 Esp. N. P. C. 9. 3 Steph. N. P. 2601.

But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insuf-

sion, receive them in what manner he chooses, so as to acquit the debtor, provided it be such as the course of trade warrants.(a) Thus where an agent, who had the management of *Sir C. Thorold's* cash transactions, took a banker's check in payment of 100*l.* due to his master, and kept it a week, when the banker failed, this was deemed to discharge the debtor, by Lord Ch. J. Holt, who relied upon the circumstance of the agent having a general authority. Mr. J. Powell was of the same opinion ; but not being satisfied as to the fact of the authority, which it was agreed was more matter of evidence than of law, a new trial was granted for the purpose of ascertaining that fact.(b)

[291] But an agent *specially employed to receive payment in money, cannot vary from his authority by receiving a bill.(c) And even a general agent cannot, without particular authority, commute the payment by receiving another thing, as a horse, &c., in discharge of the debt ;

ficient. Littledale, J. " It does not appear to me that the clerk had any authority. Had he been shown to have been authorized to receive the money, it appears from the case of *Moffat v. Parsons*, that he could not have disclaimed it. Although a party put his case into the hands of an attorney, who thereby becomes authorized to accept payment, it by no means follows that all the attorney's clerks have such an authority also." Taunton, J. " I am also of opinion that the clerk had no authority. The case of *Moffat v. Parsons*, is distinguishable from that before the court, because there the tender was made to a constituted agent, authorized to receive the money." *Bingham v. Allport*, 1 Nev. & Mann. 398. And see *Blow v. Russell*, 1 Carr. & P. 365. A tender by a defendant in execution, to the sheriff, of the debt and costs, is not sufficient to entitle him to a discharge from custody, without the authority of the plaintiff, or his attorney. *Crozer v. Pilling*, 4 Barn. & Cr. 26.||

(a) 11 Mod. 88.

(b) *Thorold v. Smith*, 11 Mod. 71, 88. And see 10 Mod. 109.

(c) *Ib.* and *Ward v. Evans*, 2 Ld. Raym. 930. 2 Salk. 442. || An agent authorized to collect a debt for his principal, cannot commute that debt for one due by himself to the debtor, by the mere operation of exchanging one for the other. The debtor cannot say he has paid his debt to the agent, by showing an agreement made by the agent to credit the debtor and debit himself with the amount which he, the agent owes. *Kingston v. Kincaid*, 1 Wash. C. C. Rep. 454.||

unless it be delivered over to the employer, who agrees to it.(d) Nor can an agent, without an express authority, compound a debt.(e) A scrivener on behalf of his client having agreed to a composition, it was held to bind the scrivener, but not the client.(f) But a broker employed to subscribe a policy of insurance, has authority to adjust the loss.(g)(1)

2. A release upon a composition(h) under a *power for that purpose, or a submission to [*292] award(i) by like authority, must be made in the

(d) Dr. & St. 226. ||*Infra*, n. (e).||

(e) An attorney on record may bind his principal by submission to award by rule of *Nisi Prius*. Say. 259. 1 Bac Ab. 208. || Attorney D. ed. by Bouvier, vol. 1, p. 491. *The Inhabitants of Buckland v. The Inhabitants of Conway*, 16 Mass. Rep. 396. *Somers v. Balabrega*, 1 Dallas, 164.|| But it is said, that the assent of a solicitor to a reference by rule of a court of equity is not binding on the client without his actual concurrence. 1 Ch. R. 104. 1 Ch. Cas. 86. Qu. † It was admitted in that case, that the consent would have been binding at law : for at law even, where an attorney had agreed to refer, contrary to the express desire of the client, the court would not set aside the order of *Nisi Prius*, by which the cause was referred, but left the client to his remedy against the attorney. *Filmer v. Delber*, 3 Taunt. 486. And see *Mole v. Smith*, 1 Jac. & W. 673, that the consent of counsel properly instructed is binding on the client.‡ || An attorney in a suit has no authority to discharge a debtor from an execution upon payment of less than the sum due on it. *Lewis v. Gamage*, 1 Pick. 347. The plaintiff's attorney, in an action for the recovery of money, has no right to enter into an agreement by which land is to be taken instead of money. *Huston v. Mitchell*, 14 Serg. & Rawle, 307. *Gable v. Hain*, 1 Penn. Rep. 267. Where the attorney of a judgment creditor endorsed on the execution, that he had received the promissory note of a stranger for a greater amount than the judgment debt, payable to the debtor, which the attorney was to collect, and that in consideration thereof, he consented that the execution should be returned unsatisfied ; and it was in evidence that the money due by the note was lost by the negligence of the attorney ; it was holden, that the judgment was not thereby discharged. *Langdon v. Potter*, 13 Mass. Rep. 319. See further, 1 Dunl. Pract. 82. *Beardsley v. Root*, 11 Johns. Rep. 464. Ante, 192, n. (3).||

(f) 2 Vern. 127.

(g) 2 Esp. Cas. 269. 1 Camp. 43. Cont. Beawes, 43.

(1) Ante, p. 191.

(h) Moor. 818.

(i) Salk. 70 ; 12 Mod. 129 ; 1 Ld. Raym. 246. Ante, || 183.||

name of the principal, and not of the agent ; unless, perhaps, upon the assignment of a debt with power to the assignee to compound, &c., where, by reason of his interest, it may be in his own name.(j)

3. Accounts settled between two agents without vouchers, but upon confidence, will not be considered as binding upon the principals, but liberty will be allowed in equity to surcharge and falsify.(k)

4. Where an agent has authority to receive payment, his receipt is the receipt of the principal.(l) But if he give a receipt without having in fact received the money, that is no bar to the principal.(m) For it would not be a bar, if given by the principal himself, upon proof of the actual non-payment.(n)

(j) *Bamfill v. Leigh*, 8 T. R. 571. || Where an agent compromised a claim of his principal, by receiving from a debtor money and other means of realizing a debt, and executed a release in his own name, it was held, that such release, not purporting on its face to have been made by the principal, or to have been executed by him, was not binding upon the principal *as a release*, and could not be set up by the debtor in bar of a recovery in an action brought for the recovery of the original debt. But it was further held, that it was competent to the debtor for the purpose of establishing an *accord and satisfaction*, to prove by parol, a ratification by the principal of the acts of the agent by showing, that with full knowledge of the facts, he reaped the benefit of the compromise, by accepting its fruits, in whole or in part ; and for that purpose to produce the release *as evidence of an agreement*, and show a compliance on his part with its requirements. *Evans v. Wells*, 22 Wend. 324.||

(k) *Beaumont v. Boulton*, 7 Ves. Jun. 617. || As to the meaning of the terms " surcharge and falsify," see ante, 52, n. q.||

(l) 11 Mod. 88.

(m) Dr. & St. 286, unless it be a release by an agent properly authorized to make releases, which must be by deed.

(n) 2 P. Wms. 295 ; Ambl. 269 ; *Fitch v. Sutton*, 5 East, 230. || Ante, 252, 254, n. (l).||

*SECTION 7.

[*293]

Delivery to an Agent.

A delivery of goods or money to an agent or servant in the course of his employment, is for most purposes equivalent to a delivery to the employer.(a) As to charge him in an action of trover ;(b) † or assumpsit for goods sold and delivered.‡ To charge a carrier with the receipt of goods to be conveyed, it is sufficient to show a delivery to his servant usually employed in that business.(c) So in an action for money had and received, it is sufficient to show that it came to the hands of an agent employed by the party charged with it.(d) And in an action brought to recover back the deposit paid on an intended sale, it was held unnecessary to prove any more than that it was paid to the person who appeared as agent for the defendant, the seller.(e)

And though, in an action against the agent, it be [is] a defence to him that he has paid over the money to his principal,(f) yet the reverse affords no defence to the principal, if the action be brought against him.(g)

(a) 10 Mod. 310 ; 2 Mod. 309.

(b) Str. 505. Post, §305.¶

(c) Bull. Ni. Pr. 72 ; Ld. Raym. 792.

(d) *Mathews v. Haydon*, 2 Esp. Cas. 509.

(e) 1 Camp. 339.

(f) Post, §390.¶

(g) *Carey v. Webster*, 1 Str. 480.

CHAPTER III.—PART III.

HOW FAR THE PRINCIPAL IS ANSWERABLE FOR NEGLIGENCE, OR WRONGFUL ACTS OF THE AGENT.

SECTION 1.

Neglect or Fraud of Agent.

1. By the employment of an agent, the employer becomes civilly responsible for his care and diligence to those who make use of him in his business.(A) For, says Lord C. J. Holt, where a trust is put in one person, and another whose interest is entrusted to him is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified.(a)

In noticing the authorities to this purpose, reference will be had to some which may seem to belong rather to the law of master and servant than to the proper subject of this treatise ; but as the principles now under discussion are derived from that source, these authorities cannot be deemed irrelevant.

[*295] *A master is responsible for the negligence or unskilfulness of a servant acting in the prosecution of his service, though not under his immediate direction.(b) Thus a smith, whose servant injures a horse

(A) || *The Citizens Bank v. The Nantucket Steamboat Co.* 2 Story's Rep. 36, 37, 55 ; *Gray v. The President &c. of the Portland Bank*, 3 Mass. Rep. 364 ; 2 Kent's Comm. 633, n. (a).||

(a) 12 Mod. 490.

(b) 1 Ld. Raym. 264. || *The Citizens' Bank v. The Nantucket Steam-*

brought to him to be shod, or a surgeon, whose servant treats a patient with gross want of skill, is liable to answer for the injury.(c) Thus also an action lies against the master for damage occasioned by his servant exercising an unruly horse in an improper place,(d) or by negligence in keeping a fire used in the master's service.(e) †And on the like principle, a landlord has been considered as *prima facie* liable for the act of his bailiff in taking *privileged* goods under a distress for rent, though not himself present at, nor participating either at the time or afterwards in the transaction. But the same learned judge who so stated the law, added, that if when the landlord came to the knowledge of the circumstances he disclaimed and repudiated the act, his liability would cease.(1)‡ Similar actions for negligence in driving carriages,(f) or navigating

boat Co. 2 Story's Rep. 50. *Booth v. Mister*, 7 Carr. & Payne, 66. *Harris v. Mabry*, 1 Iredell's (N. C.) Rep. 240. *Stone v. Codman*, 15 Pick. 299. *Wilson v. Beverley*, 2 N. H. Rep. 548. *Dixon v. Bell*, Holt's N. P. Rep. 227, *in notis*. *Smith v. Lawrence*, 2 Mann. & Ryl. 1. *Martin v. Temperley*, 4 Ad. & Ell. N. S. 298. *Lynch v. Nurdin*, 1 Ad. & Ell. N. S. 29. *Earle v. Hall*, 2 Metc. 353, 358.‡

(c) 4 Bac. Ab. 584. ‖ Master & Servt. K. ed. by Bouvier, vol. 6, p. 533. et seq.‡

(d) *Michael v. Allestree*, 2 Lev. 172.

(e) 1 Ld. Raym. 264; Salk. 13. ‖ *Viscount Canterbury v. The Attorney General*, 1 Phillips, 316, 317.‡

(1) ‡ *Hurry v. Rickman*, 2 Moody & M. 126.‡

(f) 6 T. R. 661; 2 Salk. 441, pl. 2; 1 Campb. 167. Post, ¶297. If a servant driving his master's cart on his master's business, make a *detour* from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road; but if a servant take his master's cart without leave, when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injuries he may do. "The master is only liable when the servant is acting in the course of his employment. If he was going out of his way, against his master's express commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." Parke, B., *Joel v. Morison*, 6 Carr. & Payne, 501. If a servant without his master's knowledge, take his master's carriage out of the coach-house, and

[*296] ships,(g) or negligently packing goods to be *car-

with it commit an injury, the master is not liable, because he has not in such case intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it ; but the master in such case will be liable, because he has put it in the servant's power to mismanage the carriage, by intrusting him with it. Therefore, where a servant, having set his master down in Stamford street, was directed by him to put up in Castle street, Leicester square ; but instead of so doing went to deliver a parcel of his own in the Old Street Road, and in returning along it, drove against an old woman and injured her, it was held that the master was responsible for his servant's act. *Sleath v. Wilson*, 9 Carr. & P. 607. But see *Lamb v. Lady Palk*, id. 629. In an action on the case for damage done to the plaintiff's cabriolet, from the negligence with which the defendant's cart was driven, the defendant will be liable, although it should appear, that the defendant's servant was not driving at the time of the accident, but had intrusted the reins to a stranger who was riding with him, and who was not in the service of the defendant. Lord Abinger, C. B. "As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself." *Booth v. Mister*, 7 Carr. & P. 66. See *McLaughlin v. Pryor*, 4 Mann. & Gran. 45, 46.¶

(g) 8 T. S. 188. ¶ The liability of the owner of a vessel, independent of any statutory regulation, is not affected by the circumstance of there being a pilot on board. Parker, C. J. "We think that the owner of a vessel which by collision with another vessel, has caused damage through the fault or negligence of any one on board, is answerable to the injured party in respect of their property, notwithstanding there may be a pilot on board, who has the entire control and management of the vessel. It is more convenient that such owner should seek his remedy against the pilot, whom he has selected for this service, than that the injured party should ; and it is more conformable to the general spirit of the law ; for although the pilot holds his commission under the executive authority of the commonwealth, yet in many respects he is the servant of the owner who employs him, and in regard to the time of sailing is undoubtedly under the direction of the owner. The master in such case would not be liable, for he is answerable only in respect of his authority over the vessel, which authority is entirely superseded by that of the pilot, when the vessel is under sail within pilot ground.—The pilot is indeed put in the place of the master, and there is as much reason for the owner's liability in one case as in the other." *Yates v. Brown*, 8 Pick. 23. See *Bussy v. Donaldson*, 4 Dall. 206. *Williamson v. Pierce*, 16 Martin's (La.) Rep. 399. Post, 301.

A brig which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi below New Orleans, was

through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor: it was held that the owner of the brig was not responsible for the damage sustained by the schooner. Shaw, C. J. "The maxim *respondet superior* in such cases, is well settled; but the difficulty consists in determining what facts and circumstances in legal contemplation, go to establish the relation of superior and subordinate, of master and servant, or employer and employee, in such a manner as to give effect and application to the rule.—The case of a vessel towed by a steamboat, is certainly new in its facts, and could not have been anticipated by the founders of the common law; but it is one of the advantages of the common law, that it depends upon plain, equitable and practicable principles, adapted to all times and occasions, and broad and comprehensive enough to embrace new cases as they arise. The decision of this case therefore must depend upon the application of established principles and analogous cases. The owners of a vessel or coach are held liable for damages to third persons, occasioned by the negligence or unskillfulness of those who are in the management of the ship or coach; 1. Either because they are engaged or employed by them, are subject to their order, control and direction, and so are to be deemed either generally or for the particular occasion, their servants; 2. Or, in respect to their being engaged in the business or employment of the owners, conducting and carrying on such business for the profit or pleasure of the owners, by reason of which the acts done in the prosecution of such business, shall be taken *civiliter* to be done by the employers themselves, and this, whether the persons whose negligence is the cause of damage, have been retained and employed by the principal himself, or by the procuration of others employed by him for the purpose.—Tried by either of these principles, we think that the defendant is not responsible for damages attributable to the carelessness or want of skill of the master and crew of the towing vessel. They were not the servants of the defendant; were not appointed by him; did not receive their wages or salaries from him; the defendant had no power to remove them; had no power to order or control them in their movements; had no contract with them, but only through them, with the owners of the steamboat, for a participation in the power derived from the public use and employment of that vessel by her owners. After making such contract, it was perfectly in the power of the owners of the steamboat to appoint another master, pilot and crew, and the defendant would have no cause of complaint.—3. Nor can the master and crew of the steamboat in any intelligible sense, be considered in the employment or business of the defendant, any more than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods, or the master and crew of a ferry-boat, in the employment of the owners of each coach, wagon or team transported thereon.—The case most nearly resembling this, perhaps is that of a vessel chartered, where for a certain time the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed and the crew engaged and subsisted by the owners,

ried by the master as a common carrier,(h) are in frequent use.(A)

in which case it is held, that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew." *Sproul v. Hemmingway*, 14 Pick. 1.

(h) 1 Wils. 282.

(A) ¶ The rule by which the master is liable for the negligence of his servants, does not necessarily extend to render him responsible to one of his servants, for an injury arising from the carelessness of another servant in his employ. In an action on the case against a railroad company by an engine man, for an injury sustained by the plaintiff from the negligence of their servants, a statement of facts was agreed upon by the parties and submitted to the court, by which it appears that the plaintiff was employed by the defendants as an engine man, and on the 30th October, 1837, the plaintiff then being in the employment of the defendants as such engine man, ran his engine off at a switch on the road, which had been left in a wrong condition by one Whitcomb, another servant of the defendants, who had been long in their employment as a switch-man or tender, and had the care of switches on the road, and was a careful and trustworthy servant in his general character, and as such servant was known to the plaintiff. Shaw, C. J. "This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandize for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.—The general rule, resulting from considerations as well of justice, as of policy is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle, which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be

Upon this principle the owners of ships are responsible for the non-performance † or mis-performance‡ of their

as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes; but whether he is responsible in a particular case for their negligence, is not decided by the single fact, that they are for some purposes, his agents.—In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis upon which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned under given circumstances.—Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.—In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.—It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other,

and where one can in no degree, control or influence the conduct of another. But we think this is founded upon a supposed distinction, upon which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department, and what a distinct department of duty. It would vary with the circumstances of every case.—Besides it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in *tort*, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master therefore from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.—In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished, and suitable persons employed to accomplish the object in view. We are far from intending to say, that there are no implied warranties and undertakings arising out of the relation of master and servant, &c.” *Farwell v. The Boston and Worcester Rail Road Corporation*, 4 Metc. 49. So, where several servants were engaged at the same work, and one of them was injured by an act of negligence in which all participated, the master being absent at the time, it was held, in a suit brought against the master for the injury, that the servant could not recover, though the act complained of was done under the superintendence of a foreman appointed by the master. *Brown v. Maxwell*, 6 Hill, 592. So, where two servants of the same master were employed in conveying goods in a van of the master, in his business, and by negligence in the overloading of the van by one, it broke down upon the road, and thereby the other received a severe injury, for which he brought an action against his master, founded upon such negligence; it was held that the action was not maintainable. *Priestly v. Fowler*, 3 Mee. & Wels. 1.¶

contracts by the masters whom they employ.(i) †And in like manner, the master is answerable for the conduct of the mariners under his command.‡(B)

And though the injury be not occasioned by the person immediately employed, but by another whom he employs under him, or with whom he contracts for the performance of what he has undertaken: yet the responsibility of the first employer reaches through all the stages of the service, as the following case exemplifies.

A. employed B. to repair a house; B. contracted with C. to do the work, who engaged D. to furnish materials. D.'s servant by negligently leaving the materials in the road, occasioned an injury to the plaintiff, who was held entitled to recover against A.(k) (2)

(i) 8 T. R. 523; 3 Mod. 320; and see Salk. 441; trover lies for goods lost by a servant. †The responsibility is limited by 53 Geo. III. c. 159, s. 1, to the value of the ship and freight.‡

(B) || The masters of merchant vessels, and of steamboats, are responsible as principals and common carriers, for the misfeasances and negligences of the servants under them. 2 Kent's Comm. 633, n. (a.)||

(k) *Bush v. Steinman*, 1 Bos. & Pull. 409.

(2) [A landlord of a house demised by lease is liable for an injury occasioned by the negligence of the workmen employed to repair the house, where the repairs are done under his superintendence, although at the expense of the tenant. *Leslie v. Pounds*, 4 Taunt. 649.] || A warehouseman at Liverpool, employed a master porter to remove a barrel from his warehouse, who employed his own men and tackle; and through the negligence of the men, the tackle failed, and the barrel fell and injured the plaintiff: it was held, that the warehouseman was liable in an action on the case, for the injury. *Randleson v. Murray*, 8 Ad. & Ell. 109. So, where a corn-factor was absent from his shop, and during his absence his sister managed his business; and she, wanting to send out some corn to a customer, for this purpose employed a person who occasionally worked for her brother, and who, at the time of such employment was in a state of inebriety; and the man so employed, contrary to the practice in the corn-factor's shop, took out the corn on a small warehouse truck, which he negligently left in the road, whereby a person driving along in a chaise was injured; it was held, that the corn-factor was liable in an action at the suit of the person injured for this negligent act of the drunken man, upon the ground, that the employment of a drunken man was in itself an act of negligence, and that, by such employment through his agent, the corn-factor

set the whole thing in motion, and must therefore be liable for the consequences. *Wanstall v. Pooley*, cited 6 Clark & Finnell, 910, note. A corporation authorized by law to construct a railroad which crosses a highway, is bound to place barriers across the highway at night, to prevent travellers from falling into the chasm or cut, which may have been made for the purpose of their railroad in the highway: when therefore an accident occurred by the negligence of a contractor's workmen in replacing such barriers at night, it was held, that the corporation was responsible for the negligence of the workmen. Wilde, J. delivering the opinion of the court says: "The defendants deny their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident happened, because this section thereof had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and who employed the workmen. We do not, however, think that this circumstance relieves the defendants from their responsibility. The work was done for their benefit, under their authority, and by their direction. They are therefore to be regarded as the principals, and it is immaterial, whether the work was done under contract for a stipulated sum, or by workmen employed directly by the defendants at day wages. This question was very fully discussed and settled in the case of *Bush v. Steinman*, 1 Bos. & Pull. 403. In that case it appeared, that the defendants had contracted with A. to repair his house for a stipulated sum. A. contracted with B. to do the work; and B. contracted with C. to furnish the materials. The servant of C. brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned; and it was held, that the defendant was answerable for the damage. This decision is fully supported by the authorities cited, and by well established principles." *The Inhabitants of Lowell v. The Boston and Lowell Rail Road Corporation*, 23 Pick. 24, 31. As to the liability of a corporation for the torts of its agents. See ante, 155, n. (a); *Fowle v. The Common Council of Alexandria*, 3 Peters, 409; *Maud v. The Monmouthshire Canal Co.* 4 Mann. & Gran. 237; 2 Kent's Comm. 284.

But, on the other hand: where the owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party; it was held, that the owners of the carriage were not liable to be sued for such injury; and it was held to make no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery, which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house. *Quarman v. Burnett*, 6 Mees. & Wels. 499. So, where the buyer of a bullock employed a licensed drover to drive it from Smithfield, (as by the by-laws of London, none but such could be employed for the purpose,) and the drover having employed a boy to drive it to the

owner's slaughter-house, mischief was occasioned by the bullock, through the careless driving of the boy ; it was held, that the owner was not liable for the injury, the boy not being in point of law his servant. Lord Denman, C. J. "I think we are bound by the late decision in *Quarman v. Burnett*, which was pronounced after full consideration. The party sued has not done the act complained of, but has employed another who is recognized by the law as exercising a distinct calling. The butcher was not bound to drive the beast to the slaughter-house himself: he might not know how to drive it. He employs a drover, who employs a servant, who does the mischief. The drover therefore is liable, and not the owner of the beast. I may remark, that one might perhaps be reconciled to the distinction between cases of fixed, and of moveable property by considering that, to hold the owner of a land or building liable for injury done in respect of that property, will enable the party injured to know more readily from whom he is to seek redress. In *Randleson v. Murray*, the work was in effect done by the defendant himself, at his own warehouse: if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter while under his control. So as to the decisions upon the pilot acts: when it is not necessary to employ a pilot, the master who has voluntarily employed one, is liable for his act." Williams, J. "The difficulty always is, to say whose servant the person is that does the injury: when you decide that, the question is solved; to say that the party is liable from whom the act ultimately originates, is, indeed, a rule of great generality, and one which will solve the greater number of questions; but its applicability fails in one case. For, where the person who does the injury exercises an independent employment, the party employing him is clearly not liable. I agree in the decision of *Randleson v. Murray*; for the warehouseman's servant, whether daily or weekly, is equally under the control of the warehouseman. The butcher here, whom we cannot assume to be acquainted with driving, deposes a person to drive who understands the business, and whose servant is guilty of the negligence that produces the injury. That person therefore, is the party liable." *Milligan v. Wedge*, 12 Ad. & Ell. 737. So, where the defendant, a builder, being employed by the committee of a club, to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings, made a sub-contract with a gas-fitter, to execute this part of the work; and in the course of doing it, through the latter's negligence, the gas exploded and injured the plaintiff, it was held, that the defendant was not liable in an action on the case for this injury. Lord Abinger, C. B. "The injury was occasioned by the negligence of Bland, who did not stand in the relation of servant to the defendant, but was merely a sub-contractor with him; and to him the plaintiff must look for redress. I think the true principle of law, consistent with common sense, was laid down in the case of *Quarman v. Burnett*, in which all the previous cases on this subject were cited and considered, and some distinguished, and some overruled. I have always been of the same opinion, and therefore see no reason for departing from that decision." Parke, B. "I am of the same opinion. The plaintiff has his

[*297] *† On this principle the proprietor of a wagon was deemed liable for an injury occasioned by the negligence of the driver, although it appeared that the proprietor was partner with another in the business of carriers, and that it was the exclusive department of that other to provide the horses and drivers. "The action," said Ch. J. Gibbs, "is maintainable on this principle. The wagon belongs to *Elkins* [the defendant]: he has the profit of the carriage—on what terms he engages with other persons to horse the wagon we cannot tell. The servant is engaged to drive the wagon for *Elkins*, as well as for his immediate employer. Though by the subordinate contract between the parties he is the servant of one, yet in contemplation of the law, and for all purposes of legal responsibility, he is in the employ of both."⁽³⁾ The civil

remedy against Bland, whose negligence was the cause of the injury: if he attempts to go further, and to fix the defendant, it can only be on the ground of Bland's being the servant of the defendant: but then the obvious answer is, that Bland was only a sub-contractor to do certain of the works, and that the relation of master and servant did not subsist between him and the defendant. The true rule on this subject, was laid down by this court in the case of *Quarman v. Burnett*, which is directly in point, and cannot be distinguished from the present case." *Rapson v. Cubitt*, 9 Mees. & Wels. 710; and see *Winterbottom v. Wright*, 10 Mees. & Wels. 109, 114; *Cobb v. Abbot*, 14 Pick. 289; *Hughes v. Boyer*, 9 Watts, 556.

A distinction seems to have been suggested as to the liability of the master for the act of a person employed by his servant; whether the tortious act had reference to real or personal property. See the language of Lord Denman, in *Milligan v. Wedge*, quoted *supra*. The distinction appears to be recognized by Shaw, C. J., who says; "The general principle to be extracted from the cases, in regard to the use of real property, is, that the owner of real estate, either absolutely or for the time being; he who has the management and control, and takes the benefit and profit of the estate; he at whose expense, and on whose account the business is conducted, shall be responsible to third persons for the carelessness, negligence, or want of skill of those who are carrying on and conducting the business, by which they are damnified; and this, whether the persons thus employed and engaged, are working on wages, or by contract; and whether they are employed directly by the principal, or by a steward, agent, or manager having the superintendence of the estate." *Earle v. Hall*, 2 Metc. 357, 358.¶

(3) † *Weyland v. Elkins*, Holt, N. P. C. 227. 1 Stark. N. P. C. 272, S. C. † || *Cobb v. Abbot*, 14 Pick. 289 ||

law seems to have confined the liability resulting from the acts of servants to the case where the servant was chosen by the master and under his immediate control ; but it is doubtful whether our law in some instances does not carry it further. Accordingly the question whether the owner of a carriage having hired of a stable keeper a pair of horses and a driver for the day, was responsible for an injury caused by the negligence of that driver,

*was the occasion of a memorable conflict of opinion among the judges of the Court of King's Bench. [*298]

Abbott, C. J. and Littledale, J. held, that he was not liable. Bayley and Holroyd, Js. that he was.(4) In the several

(4) † *Laugher v. Pointer*, 5 B. & C. 547. Upon the original argument for a new trial in the King's Bench the judges differed in opinion, whereupon it was directed to be argued anew before all the judges ; and there being still a difference of opinion, it was referred back to the judges of the King's Bench to deliver the judgment. ‡ ¶ In that case it appeared, that the defendant, a gentleman usually residing in the country, being in London a few days with his own carriage, sent in the usual way to a stable keeper for a pair of horses for a day. The stable keeper accordingly sent a pair, and a person to drive them. The defendant did not select the driver, nor had he any previous knowledge of him, but the stable keeper sent such person as he chose for his purpose. The driver had no wages from his master, but depended on receiving a gratuity from the person whose carriage he drove ; the defendant in this case gave him five shillings as a gratuity. By reason of his negligent driving the plaintiff's horse received an injury, whereupon the plaintiff brought his action ; and at the trial before Abbott, Ch. J. he directed a nonsuit ; as to the setting aside of which, and granting a new trial, the judges, *in banco*, were divided. See ante, 296, n. (2), *Quarman v. Burnett*, there cited. In *Brady v. Giles*, 1 Moody & Rob. 495, which was an action for damage done through negligent driving a carriage and horses let to hire and driven by the servants of the owner, it was held to be a question for the jury, whether the servants were acting as the servants of the person hiring, or of the owner ; Lord Abinger refusing to nonsuit the plaintiff observed, " It had always appeared to him, that the Court of King's Bench had pursued an erroneous course in *Laugher v. Pointer*, when they allowed the question now raised to be discussed, as if it were a question of law for the judge to decide. It always appeared to him, that it was quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible, and the temporary hirer became so." ¶

elaborate judgments delivered upon that case, every argument and every authority which can throw light upon the subject is to be found.†

2. But the responsibility of the master for the servant's negligence, or unlawful acts is limited to cases properly within the scope of his employment. For where the servant, a stage coachman, (not being a common carrier of goods,) undertook to carry goods, which he lost, it was determined that the master was not liable, for no master is chargeable for his servant but when he acts in-execution of the authority given by his master.(l) And in an action brought against the owners of a ship for goods lost by the carelessness of the master, judgment was given for the defendant, because it did not appear that the ship was usually employed to carry goods for hire; for Lord Hardwicke said, "no man could say *that the master, by taking in goods of his own head, could make the owners liable."(m)

(l) *Middleton v. Fowler*, 1 Salk. 282.

(m) *Boucher v. Lawson*, Rep. Temp. Hardwicke, 85, 194. Abbot, 109.

† And see *Colvin v. Newberry*, 8 B. & C. 166. Dan. & Lloyd, 61. Afterwards reversed on error in Exchequer Chamber. *Newberry v. Colvin*, 7 Bing. 190. All the authorities as to the liability of the owners of a ship chartered to the master will be found there referred to. ¶ Where a ship is not put up to freight, but employed by the owner on his own account; and the master receives the goods of another person on board, as part of his privilege, taking to himself the freight and commissions, the owner of the ship is not liable in case of embezzlement, or for the conduct of the master in relation to such goods. *King v. Lenox*, 19 Johns. Rep. 235. A steamboat company, or the members thereof, who, by their act of incorporation, are made individually liable as common carriers, incorporated for the transportation of goods, wares and merchandize, are not common carriers of packages of bank bills, unless it be shown that they have made the carriage of such packages a part of their ordinary business; and it was accordingly holden in this case, that the defendants, members of such a company, were not liable for the loss of a package of bank bills entrusted to the master of one of their boats; it appearing that he had been forbidden by his employers to carry money, that he had never knowingly carried any, that the usage was for persons sending money to compensate the masters, and that the owners charged freight only on specie. *Sewall v. Allen*, in error, 6

‡ Nor is the master liable for the *wilful* act of his servant, whereby damage is occasioned to another : for this is a *trespass* by the servant, for which the master cannot be made answerable unless he has originally commanded or subsequently assented to the act.(A) Therefore, where a servant wilfully drove his master's carriage against another, without the direction or assent of his master, the latter was not held liable.(5) And in a similar case the distinction was thus stated : If a servant driving a carriage, in order to effect *some purpose of his own, wantonly* strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment.(6)‡

This constructive negligence or misconduct, arising from the acts of an agent, has been held [*300] not to attach to some public offices,(n) such as the postmaster general,(o) commissioners of the customs and

Wend. 335. S. C. 2 Wend. 327. The knowledge of the owners that the master carried the money for hire, would not affect them, unless the hire was on their account, or unless the master held himself out as their agent in that business, within the usual scope and employment of the steamboat. *The Citizens Bank v. The Nantucket Steamboat Co.* 2 Story's Rep. 17.||

(A) || *The Inhabitants of Lowell v. The Boston and Lowell Railroad Co.* 23 Pick. 25. *Schmidt v. Blood*, 9 Wend. 268.||

(5) ‡ *M'Manus v. Crickett*, 1 East, 106.‡

(6) ‡ *Croft v. Alison*, 4 B. & A. 590.‡

(n) Per Holt, C. J. 2 Salk. 240. 4 T. R. 66.

(o) *Lane v. Cotton*, 1 Ld. Rym. 646. 1 Salk. 18. *Whitfield v. Lord Le Despencer*, Cowp. 754. || *Martin v. The Mayor, &c. of Brooklyn*, 1 Hill, 545. Post, 398, n. (h).|| This exception does not include sheriffs, who are liable for their under-sheriffs and bailiffs ; as for a false return by the under-sheriff, Dr. & St. 280 ; for an erroneous return of a panel, whereby it is quashed, Roll. Abr. 92, pl. 2 ; or for an escape of a prisoner in execution from the bailiff, ib. pl. 3. So for money wrongfully taken by a bailiff, under color of his office, the sheriff is liable in an action for money had and received, *Jones v. Perchard*, 2 Esp. Cas. 507. But the plaintiff must prove the authority by the warrant, and show that it was executed by the person

excise, auditors of the exchequer, &c. who are not liable for any negligence or misconduct of the inferior officers in their several departments.(p) [And the captain of a king's ship of war is not responsible for the damage done to another vessel through the negligence of his lieutenant, although the captain be on board the ship, provided no per-

to whom it is directed, but need not show that the money came to the sheriff's hands, *ib.* And in 3 Wils. 309, it was decided that trespass lay against a sheriff for taking the goods of A. instead of B. by his bailiff. || *Locke v. Stearns*, 1 Metc. 563. An action lies against a sheriff for the act of his deputy in taking more fees on levying an execution, than are allowed by law ; and whether the sheriff recognized the act of his deputy or not, need not be shown. *McIntyre v. Trumbull*, 7 Johns. Rep. 35. But he is not amenable for the acts of his deputy, unless they are performed in the ordinary course of his official duty, as prescribed by law. *Gorham v. Gale*, 7 Cow. 739. S. C. 6 Cow. 467, n. (a) A sheriff is responsible for money received by his deputy on erroneous process, it being received *colore officii* ; and he cannot avail himself of the defect in the process. *The People v. Dunning*, 1 Wend. 16. But a party may, by his own acts, so constitute the deputy his own special agent, as to discharge the sheriff's liability, as by giving the deputy directions to take a course out of the usual line of procedure. *Armstrong v. Garrow*, 6 Cow. 465. Nor is a sheriff liable to a party, on whose nomination he has appointed a special bailiff, for the acts of such bailiff. Bac. Abr. Sheriff, H. 4. See further as to the liability of a sheriff, post, 396 n. (a).||

(p) Cowp. 766. This distinction in favor of public officers is of very old standing. See Dr. & St. 279 ; Di. 2, c. 42 ; and see Stat de Scaccario, 51 H. 3, st. 5, s. 7 & 8 ; st. 21, ed. 3, c. 21. De proditionibus. || And that, though the superior had the appointment of the inferior officers. "The Keeper of the Great Seal, and other persons holding high situations in the state, have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability." Lord Lyndhurst. *Viscount Canterbury v. The Attorney General*, 1 Phillips, 324.

If a public officer authorize the doing of an act beyond the scope of his authority, or if he be guilty of negligence or malfeasance in the discharge of duties to be performed by himself, he will be held responsible : it is otherwise, in respect to the malconduct or malfeasance of such persons as he is obliged to employ ; for the maxim *respondeat superior*, does not apply to such cases. *Bailey v. The Mayor &c. of New York*, 3 Hill, 531. *Hall v. Smith*, 2 Bing. 357.||

sonal misconduct on the occasion be imputable to him.(7)] But this only applies to inferior *officers* of the department; for if the person, whose misconduct comes in question, be the private servant or deputy of the principal officer, the latter is liable for his acts. Thus, the Chancellor of (*q*) the Court of Augmentations to King Edward VI., having, by virtue of his office, taken a bond from the purchaser of lead sold by the King's order, and having deposited the bond with his servant, who fraudulently delivered it to the obligor, was held by all the judges to be chargeable to the King, because the possession of his servant by his order was his own possession. [*301]

‡ The ground of the exemption is, that as the appointment is not with the principal, he ought not in reason to be answerable for the acts; and on this manifest ground of equity, owners and masters of vessels are, by the statute which regulates the pilotage of ships,(8) released from all liability to third parties for the negligence or unskilfulness of *pilots* duly licensed and qualified.‡

3. If a man employ an agent in the commission of a fraud, he is clearly liable for it himself; as if a goldsmith by his servant put off counterfeit plate,(*r*) or a taverner corrupted wine; they are *answerable. [*302] And employers are also civilly liable for frauds

(7) [*Nicholson v. Mounsey*, 15 East, 384.]

(*q*) Dy. 161; 3 Mod. 323.

(8) ‡ 6 Geo. IV. c. 125. There are other clauses in the act taking away the responsibility of the master and owner in particular cases.‡ || *Smith v. Condry*, 1 Howard, 28. *Bennett v. Moita*, 7 Taunt. 258. *McIntosh v. Slade*, 6 Barn. & Cr. 657. *Martin v. Temperley*, 4 Ad. & Ell. N. S. 309, 310. But independent of statute, the owner is liable for the acts of the pilot, although licensed, as an ordinary agent. Ante, 295, n. (*q*).||

(*r*) Cro. Jac. 473. 1 Str. 653. Roll. Abr. 95. 1. 15. It is adjudged in a very old case, that if a servant sell an unsound horse in a fair, the master is not liable, unless he commanded him to sell to some one in particular; but if, by command or cover of the master he sells to one in particular, an action lies. 9 H. 6. 53. Bridgm. 128.

committed by their servants or agents, without their authority, if done in their employment.(s)

The owner of counterfeit jewels, knowing them to be so, sent an agent abroad with them to be disposed of; but without directions either to represent them as genuine, or to sell them to any one in particular. The agent, however, representing them as good jewels, procured a person to sell them as such, who was imprisoned by the laws of the country for the deceit, for which injury he brought an action against the owner of the jewels, and recovered.(t)

In an action on the case for a deceit in selling silk to the plaintiff, as silk of a particular description, the defendant well knowing that it was of another description, it appeared that there was no actual deceit in the defendant, but that it was in his factor abroad; and the question was, if this deceit should charge the merchant. And Holt, C. J., was of opinion, that the merchant was answerable for the deceit of his factor, though not **criminaliter yet civiliter; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and confides in the deceiver should be a loser than a stranger.*(u)

4. The principal is never criminally answerable for the act of his deputy; they must each answer for their own acts, and stand or fall by their own behavior. To affect the superior criminally by the act of his deputy, there

(s) 1 Str. 653. (S. P. per Lord Ellenborough in *Crockford v. Winter*, 1 Campb. 127.) || Ante, 257, 258, 259. Post. 325. *Wilson v. Fuller*, 3 Ad. & Ell. N. S. 68. 1009. *Jeffrey v. Bigelow*, 13 Wend. 518. *The Bank of the United States v. Davis*, 2 Hill, 452. *North River Bank v. Aymar*, 3 Hill, 263. *Locke v. Stearns*, 1 Metc. 560. *Sandford v. Handy*, 23 Wend. 260.||

(t) *Southern v. How*, Bridgm. 126, 127. 2 Moll. 330. In the report of this case, Cro. Jac. 468, it is said that the court inclined against the plaintiff; but the judgment finally given is not there mentioned. Ante, p. 152.

(u) *Hern v. Nichols*, 1 Salk. 289. But see 1 Com. Dig. 240. See *The Bank of the United States v. Davis*, 2 Hill, 465. *North River Bank v. Aymar*, 3 Hill, 268. *Lobdell v. Baker*, 1 Metc. 203.

must be the command of the superior for the act in question.^(w)

‡ An exception, however, to this general rule seems to have been introduced into the law in cases of libel. On a recent prosecution against the proprietors and editor of a newspaper for a libel,⁽⁹⁾ evidence was given on the part of the proprietor, showing that at the time of the publication in question he was in a distant part of the country, nor in any way interfering with the conduct of the paper in which the libel was contained; and it was contended on general principles, that he could not be made criminally responsible for the act of his servant; but Lord Tenterden in summing up said, "I am bound to state the law as I have received it from my predecessors. It is conceded that it has been held in several cases *that a pro- [*304] prietor so situated is criminally answerable. It is said, that this is a different principle from that which prevails in all other criminal cases; but this does not appear to me to be so: the rule seems to me to be conformable to principles and to common sense. Surely a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person⁽¹⁰⁾ might be put

(w) Per Raymond, C. J. 2 Str. 885; *Rex v. Stone*, 7 T. R. But the act of a deputy may forfeit the office of the principal, 29 H. 6. 34, cited 1 Salk. 18.

[9] ‡ *Rex v. Gutch*, 1 Moody & M. 433.‡

(10) ‡ Supposing the report to be correct, it is difficult to understand what his lordship meant by this expression. There can be no person who is not *criminally* responsible. Every man is capable of being punished. If his lordship meant *civilly* irresponsible, then the argument had no application, because no one pretends that the proprietor ought not to be answerable *CIVILLY*; that is to say, in damages to the party injured.‡

forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether.†”

[*305]

*SECTION 2.

Tortious Conversion, or Trespass of Servant or Agent.

1. Any unlawful meddling with, or conversion of property by a servant or agent in the service of his employer, subjects the latter to an action.(a) As if a servant employed in the management of business, purchase goods which have been stolen, the owner may recover the amount from the master, after a demand and refusal.(b) Thus also, where an agent of the East India Company purchased a ship, for the use of the company, of the master, who had no power to sell it : on a bill filed against the company a decree was made, that they should account for the ship and cargo, though the purchase were without their privity.(c) So a servant selling the goods of an intestate, and paying over the money to his master, makes the latter liable as executor *de son tort*.(d)

Upon an action of trover against a master, a pawnbroker, it was held sufficient for the plaintiff to prove that he tendered the money, for which the article was pawned, to the pawnbroker's servant, who said he had lost it.(e)

(a) Say, 41, 42 ; 1 Str. 505.

(b) 12 Mod. 521.

(c) 1 P. Wms. 396.

(d) 2 T. R. 97.

(e) Per Holt, C. J. 2 Salk. 441. ¶ In an action of trover against the defendant, for not delivering some wine deposited with her by way of security, for an advance of money, it was held, that it was not sufficient evidence of a conversion to show, that her son, who acted as her general agent, refused to give it up ; and that it was necessary to prove, that such agent acted under a special direction, in order to make the defendant liable. *Pothonier v. Dawson*, Holt's N. P. Rep. 383.¶

*2. The previous command, (*f*) or subsequent [*306] assent, (*g*) of the master to the trespass of his servant, makes him liable as a trespasser. But he is not liable for trespasses committed by his servant beyond what his directions extend to, (*h*) nor is he answerable for any excess committed in the execution of his lawful commands. (*i*)

3. The responsibility of the principal is confined to acts done either under his express direction, or in his service, and therefore under his constructive command. In all the cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury. (*k*) No wilful trespass of a servant, not *arising [*307] out of the execution of his master's orders or employment, will make him responsible. (*l*)

(*f*) 4 Inst. 317; Bro. Trespass, 148, 307. A party whose attorney sues out a void writ, under which the defendant is imprisoned, is, together with the attorney, liable to an action, 2 Bl. Rep. 245, ib. 866, though the sheriff or officer executing the writ is protected by it. Id. ib. † And the attorney is answerable for a trespass committed by his *agent* in suing out execution after payment by the judgment debtor, though it was done without his knowledge. The attorney and the agent are to be considered as one person. Per Abbott, C. J. *Bates v. Pilling*, 6 B. & C. 38.†

(*g*) Bro. Trespass, 113; 6 Com. Dig. 393.

(*h*) *Sanders and Archer's case*, 2 Leon. 75; Plow. 18 Eliz. 437. || *Wilson v. Beverley*, 2 N. H. Rep. 548; *Schmidt v. Blood*, 9 Wend. 268. Where a cask, containing a quantity of gold coin was deposited in a bank for safe keeping, and the gold was fraudulently taken out by the cashier of the bank, it was held that the bank was not liable to the depositor for the value of the gold so taken. *Foster v. The President &c. of the Essex Bank*, 17 Mass. Rep. 479.||

(*i*) Skinn. 228; Bac. Ab. Master and Servant, (L). But see Lane, 90.

(*k*) 27 Ed. III. st. 2, c. 19, enacts, that nul marchaunt nautre, de quel condition quil soit, perde ne forface ses biens ne marchaundises pur trespass et forfaiture de son servant sil ne le face per commaundment ne abette de son maistre, ou qu'il eit mespris en l'office en quel son maistre luy ad mys, ou en autre manere que le maistre soit tenuz a respondre pur le fait son servant per le ley marchaunt, come per ailleurs ad est usee.

(*l*) 8 T. R. 533; 1 East, 106; 6 T. R. 125; Br. Ab. tit. Trespass, pl. 435. Ante, p. 299.

4. Where several agents are employed, the remedy for injuries sustained by the act of one must be either against the first employer, or against the party by whom the injury is immediately occasioned.*(m)*

(m) 6 T. R. 411; 1 Bos. & Pull. 404.

CHAPTER III.—PART IV.

ACTIONS AGAINST PRINCIPALS.

SECTION 1.

Pleadings in.

IN declaring upon a contract executed by an agent it may be described as a contract by the principal. Thus, in an action on a policy of insurance, † not under seal, † signed by a broker, it is sufficient to declare either as upon a policy signed by the defendant himself, or as upon a policy signed by his agent for him.(a)(1) It is said by Lord Mansfield to be the better way to declare according to the truth ; that is, upon a *policy signed by [*309] J. S. as agent for the defendant, duly authorized by him in that behalf.(b) A declaration charging the *master*, the defendant, with having negligently driven his cart against the plaintiff's horse, was held to be supported by evidence that the servant drove the defendant's cart.(c) (2)

(a) *Nickleason v. Croft*, 2 Burr. 1188, 9.

(1) [So a bill of exchange, though accepted by an agent, may be stated in pleading to have been accepted by the principal. *Heys v. Heseltine*, 2 Camp. 604. And even if the declaration state that the principal endorsed the bill, *his own proper hand being thereunto subscribed*, that averment, it seems, may be satisfied by proof of an endorsement by an authorized agent. *Helmsley v. Loader*, ib. 450. But see *Levy v. Wilson*, 5 Esp. N. P. C. 180, *contra*.]

(b) *Nickleason v. Croft*, 2 Burr. 1188, 9.

(c) *Rucker v. Fromont*, 6 T. R. 659.

(2) † But where the action is brought against the *master* it must be an action on the case, and not of trespass.†

SECTION 2.

What Proof of Authority necessary.

1. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by a power of attorney, it must be proved by the production of the instrument itself, that it may appear whether the authority has been pursued (a) And if the act [*310] be such as could only be done under a written authority, (b) it seems requisite to produce it, (c) or to account for the non-production. But in other cases, it is sufficient to prove that the agent has acquired credit by acting in that capacity, and has been recognized by the principal in other instances. (A) Thus in an action on a policy of insurance, underwritten by the defendant, it was proved that the defendant's name was subscribed by one H., who, it appeared, was in the constant habit of subscribing policies for the defendant. It was insisted that the

(a) *Johnson v. Mason*, 1 Esp. Cas. 89 ; and in *Coore v. Callaway*, Ib. 115, Lord Kenyon said, he recollected a case where a person having refused to take a conveyance, executed by one having a power of attorney for that purpose, it was held to be lawful in him to refuse a conveyance so executed, as it multiplied his proofs.

(b) Ante, Ch. III, p. I, s. 1, || p. 157, et seq.||

(c) But see *Rex v. Bigg*, 3 P. Wms. 427, where it is alleged in argument, that, in an action against the bank upon one of their notes, it would not be necessary to prove the appointment under seal of the subscribing clerk, but that it would suffice to show his employment in fact. Ante, p. 156.

[And in the case of *Yarborough v. The Bank of England*, 16 East, 6, which was an action of trover, it was decided that if it were essential to a conversion of the property that the Bank should have authorized the act under their seal, such authority would be presumed after verdict ; but that it did not seem necessary that the act of detention done by their servants, within the scope of their employment, should be so authorized.]

(A) ||Ante, 162, 163.||

authority of H. should be produced, because it might have been limited, or for a particular purpose : but Lord Kenyon held, that the acts of H. held him out to the world as properly authorized ; and his having subscribed several policies in the defendant's name was sufficient evidence of that authority in order to charge the defendant ; and that if H. were only a particular agent for the defendant, it lay upon *him to show it, and not on the plain- [*311] tiff.(d) But it must be presumed, though not mentioned in the report, that there was some evidence of the agent's former transactions having been recognized by the principal. For in a late case, which was likewise upon a policy of insurance, the subscription was by one B. for the defendant : and a witness proved, that he had often seen B. sign policies for the defendant, but had not seen any general power of attorney from the defendant to B., nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed. Lord Ellenborough held, that the agency was not sufficiently proved.(e)

2. In all actions founded upon the acts of agents, whether upon contracts or for injuries done by them, for which damages are sought against the principal, it is necessary to give such evidence as establishes the relation between master and servant.(f) When the general relation does not exist, it must be shown in the particular instance.(g) In all mercantile transactions, *except [*312] where the authority is especially given by power

(d) *Neale v. Erving*, 1 Esp. Cas. 61. + *Haughton v. Ewbank*, 4 Campb. 88 ; ante, p. 169, &c.†

(e) *Courteen v. Touse*, 1 Campb. 43, n. (a). In actions on policies of insurance, signed by agents, they may either be described in the declaration as signed by the defendant himself, or by A. B. his then factor or servant in that behalf. *Nickleason v. Croft*, 2 Burr. 1188. Ante, p. 308.

(f) Per Lord Kenyon, 7 T. R. 113.

(g) *Id. ib.* The following distinction is mentioned by way of illustration. In an action against a sheriff for the misconduct of his bailiff, who is not considered as the general servant of the sheriff, it is necessary to prove the sheriff's warrant under which the bailiff acted ; but an under-sheriff is the

of attorney, or other express commission in writing, the fact of usual employment, from which the public is justified in giving credit to the person so employed, forms the usual evidence of authority. *(h)* The circumstances under which that presumption may be made having been already treated of, it is unnecessary to repeat them here. *i)*

Or where no previous authority can be proved, it is often sufficient to prove a subsequent assent by the person for whom an act is done ; and his accepting the benefit of the act amounts, in many instances, to proof of such assent. *(k)* An authority to receive payment upon bonds, bills, &c., is usually evidenced by the custody of the instruments themselves. *(l)*

[*313]

SECTION 3.

What Authority necessary by the Statute of Frauds.

By the 4th section of the statute. 29 Car. II. c. 3, certain agreements therein mentioned are made void, unless the agreements, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, *or by some other person thereunto by him lawfully authorized.* And by section 17, relating to the sale of goods above 10*l.* some note or memorandum in writing of the bargain must be made and signed by the parties to

general deputy of the sheriff for all purposes, and it does not therefore require the same evidence of particular employment to affect the sheriff by his acts. 7 T. R. 113.

(h) And see ante, note *(c)*. *Rez v. Bigg*, 3 P. Wms. 427. It seems that usual employment is evidence of the regularity of the appointment. || As to implied authority to sign checks, indorse bills, &c. See *Prescott v. Flinn*, 9 Bing. 19, cited ante 169, n. 7.||

(i) Ante, p. 161, &c.

(k) Ante, p. 165, &c.

(l) Ante, p. 274, &c.

be charged by such contract, or their *agents* thereunto lawfully authorized. It becomes therefore often necessary to decide what persons are empowered under these provisions to sign the agreements and contracts there mentioned. It has been already seen, that the authority under these clauses need not be in writing.(a) An opinion was in one case intimated, that sales by auction of goods were not within the 17th section: and it was decided in the same case, that if they were, yet that the auctioneer was to be considered as agent for both parties, so as to fulfil the requisites of the statute, by putting down the name of the buyer in his *book.(b) The former [*314] opinion appears now to be considered as very questionable.(c) (1) The latter decision has been sometimes doubted; and a contrary determination has taken place in regard to sales of land;(d) though the provisions of the statute, as to the memorandum in writing, are the same in both.(e) (2) But whatever be the *founda- [*315]

(a) *Simon v. Motives*, 3 Burr. 1921. || Ante, 160 and n. (q) *ibid*, n. (7) 172, n. (p).||

(b) *Hinde v. Whitehouse*, 7 East, 572; *Blagden v. Bradbear*, 12 Ves. 472. || Ante 159.|| But see 13 Ves. 472, 473.

(c) *Coles v. Trecothick*, 12 Ves. 249.

(1) †And has since been altogether denied; first, incidentally by Lord Ellenborough in *Hinde v. Whitehouse*, 7 East, 568; and secondly, by a positive decision on the point in *Kenworthy v. Schofield*, 2 B. & C. 945.†

(d) *Stansfield v. Johnson*, Esp. N. P. C. 101, coram Eyre, C. J. *Walker v. Constable*, 1 Bos. & Pull. 306.

(e) Per Lord Eldon, 9 Ves. 249. The only difference between the 4th section and the 17th, in this respect, is, that the expression used in the 4th section is "some other person thereunto lawfully authorized;" and in the 17th it is "their agents thereunto lawfully authorized."

(2) [In the case of *Emmerson v. Heelis*, 2 Taunt. 38, it was decided by the Court of Common Pleas, that an auctioneer was, by implication, an agent lawfully authorized by the purchaser to sign a contract for him for the purchase of an interest in land, and that the authority was communicated by the purchaser bidding aloud. This decision was acted upon and recognized in the subsequent case of *White v. Proctor*, 4 Taunt. 209: and it should seem that it makes no difference, whether the auctioneer writes down his own name, or that of the purchaser, or that of the bidder, if

tion of this distinction, the rule formerly laid down as to

agent for another, since the auctioneer's signature of the bidder's name will bind the principal. This question was afterwards brought under the consideration of Sir William Grant in the case of *Kemeys v. Proctor*, 3 Ves. & Bea. 57, in which his honor adhered to the decisions in the Common Pleas, although he observed, that "if the question were open, and he were asked his opinion whether an auctioneer be the agent of the purchaser as well as of the vendor, he should be disposed to say that he was not." || "The nature of the proceeding by auction—the bidding for the purpose of making the purchase—the necessity of making a statement of the bidding—the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances furnished intelligible ground for the decision in *Emmerson v. Heelis*, and the approbation which has since been bestowed upon it. Yet both Sir William Grant and Lord Eldon said that, before that decision, they should not have considered that the auctioneer was such an agent, but should have agreed with the previously expressed opinion of Lord Chief Justice Eyre that he was not an agent so authorized." Lord Langdale, *M. R. The Earl of Glengal v. Barnard*, 1 Keen, 788. || Where, however, it is neither admitted nor proved that the signature was by an agent lawfully authorized, a court of equity will not compel a specific performance of the contract. *Howard v. Braithwaite*, 1 Ves. & Bea. 202.] || The subject was elaborately examined by Kent, Ch., in *McComb v. Wright*, 4 Johns. Ch. Rep. 659, who held, in accordance with the doctrine in *Emmerson v. Heelis*, and the cases growing out of it, that an auctioneer is an agent lawfully authorized by the purchaser, either of land or goods, at auction, (there being no difference in the construction of the two sections of the statute of frauds) to sign the contract of sale for him as the highest bidder; and writing his name as the highest bidder in the memorandum of the sale by the auctioneer, immediately after receiving his bid and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds, so as to bind the purchaser. See *Hicks v. Whitmore*, 12 Wend. 548, which is quoted somewhat at length, (although perhaps it might better have been reserved for this as a more appropriate place for insertion,) ante, 160, n. (q) and the particular language of the Revised Statutes of New York upon which the decision in that case turned. Rev. Stat. of New York, part 2, ch. 7, tit. 1. vol 2, (2d ed.) p. 70, § 4. The duty of the auctioneer, on a sale of goods, is prescribed by the Revised Statutes of New York. "When goods shall be struck off at auction, and the bargain shall not be immediately executed by the payment of the price, or the delivery of the goods, it shall be the duty of the auctioneer to enter, in a sale-book to be kept by him for that purpose, a memorandum of the sale, specifying the nature, quantity and price of the goods, the terms of sale, and the names of the purchaser, and of the person

sales of chattels has been uniformly adhered to,^(f) and is become the rule in all sales made by brokers acting between the parties buying and selling; where the memorandum in the broker's book, and the *bought and sold notes* transcribed therefrom and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding upon each.^(g) But *an auctioneer's [*316]

on whose account the sale is made." Rev. Stat. of New York, part 1, ch. 17, tit 1. vol. 1, (2d ed.) p. 527, § 26.

It has been held by the Supreme Court of New York, (affirming the doctrine that the auctioneer is the common agent,) that the memorandum of the auctioneer to be valid, must contain everything necessary to show the contract between the parties, so that there be no need of parol proof to explain the intention of the parties; and it was accordingly held, in this case, where a pew in a church was sold at auction to the defendant, and the only memorandum of the sale was an entry made by the auctioneer on a chart or plan of the ground-floor of the church, exhibited at the auction, of the *name* of the purchaser, and of the *sum* bid by him, that the memorandum was not sufficient within the requirements of the statute; although at the time of the auction, a written or printed advertisement, containing the conditions of sale, was exhibited and read to the purchaser. *The Trustees of the First Baptist Church of Ithica v. Bigelow*, 16 Wend. 28. But whether the auctioneer be the agent of both purchaser and seller, depends upon the facts of the particular case: therefore, when a party to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer, it was held, that he was not bound by the printed conditions of sale which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. *Bartlett v. Purnell*, 4 Ad. & Ell. 792.||

(f) *Hinde v. Whitehouse*, 7 East, 569, 572, per Lord Ellenborough. || 2 Kent's Comm. 510, 511. *Sewall v. Fitch*, 9 Cow. 315, cited ante 160, n. 7.||

(g) Id. ib. *Rucker v. Cammeyer*, 1 Esp. N. P. C. 105. *Hicks v. Hankin*, 4 Esp. N. P. C. 114. || *Trueman v. Loder*, 11 Ad. & Ell. 589.|| The names of both buyer and seller ought to appear in the memorandum. *Champion v. Plummer*, 1 Bos. & Pull. New Rep. 253. 5 Esp. 244. || *Merritt v. Clason*, 12 Johns. Rep. 102. *The Ex'rs of Clason v. Bailey*, 14 Johns. Rep. 484.|| Though in *Hicks v. Hankin*, 4 Esp. N. P. C. 114, cited above, a note in this form, "Sold G. H., 320 quarters of malt at 74s." sign-

ed "J. T." J. T. being the *seller's* broker was ruled by Mr. Justice Heath to be sufficient within the statute.

|| Clason employed Townsend to purchase a quantity of rye for him. He, in pursuance of this authority, purchased of Bailey & Voorhees, 3000 bushels at one dollar per bushel, and at the time of closing the bargain, he wrote a memorandum in his memorandum book, in the presence of Bailey & Voorhees, in these words: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, 3000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at one dollar per bushel, and payable on delivery." The terms of the sale and purchase had been previously communicated to Clason, and approved of by him; and yet at the time of delivery, he refused to accept and pay for the rye. Under circumstances nearly the same, a similar agreement had been established by the Supreme Court of New York in *Merritt v. Clason*, 12 Johns. Rep. 102, on which a writ of error was brought, and which seems to have been argued and decided in connection with the case, the facts of which have just been stated. In this case too, the Supreme Court had decided in favor of the validity of the memorandum, and their judgment was sustained by the Court of Errors. Kent, Ch. the only judge of that court who delivered an opinion says; "It is admitted that Clason signed this contract, by the insertion of his name by his authorized agent, in the body of the memorandum. The counsel for the plaintiff in error do not contend against the position, that this was a sufficient subscription on his part. It is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle or at the bottom. Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party were not there by their direction, yet the better opinion is, that Clason, the party who is sought to be charged, is estopped by his name, from saying that the contract was not duly signed within the purview of the statute of frauds; and that it is sufficient if the agreement be signed by the party to be charged." *The Ex'rs of Clason v. Bailey*, 14 Johns. Rep. 484.

The broker's memoranda, in both these cases were written with a lead pencil. In *Merritt v. Clason*, it was urged by counsel, that this is not such a writing as was intended by the statute of frauds. "If it is, then a writing on a slate, or with chalk on a door or wall, would be a good memorandum within the statute. It may be completely effaced in a moment, with a piece of india rubber, and another contract written in its place without the possibility of detecting the fraud. This would not be the case if it were written with ink. Such a writing in pencil, cannot satisfy the object of this statute. It is no better than tracing characters in the sand." The same objection was raised in the other case, in the Court of Errors, to which Kent, Ch. replied; "The statute requires a writing. It does not undertake to define with what instrument, or with what material

the contract shall be written. It only requires it to be in *writing*, and signed, &c.; the verdict here finds that the memorandum was *written*, but it proceeds further and tells us, with what instrument it was written, viz., with a lead pencil. But what have we to do with the kind of instrument which the parties employed, when we find all that the statute required, a memorandum of the contract in *writing*, together with the names of the parties? To *write* is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetic writing as well as we do, but it is certain that the use of paper, pen, and ink was for a long time unknown to them.—The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument, or the material by which letters were to be impressed on paper or parchment has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on this subject, the courts have, with great latitude and liberality, left the parties to their own discretion. It has accordingly been admitted that printing was writing within the statute, and that stamping was equivalent to signing, and that making a mark was subscribing within the act. I do not find any case in the courts of common law in which the very point now before us has been decided, viz., whether writing with a lead pencil was sufficient; but there are several cases in which such writings were produced, and no objection taken. The courts have impliedly admitted, that writing with such an instrument, without the use of any liquid, was valid, &c." In *Pitts v. Beckett*, 13 Mees. & Wels. 743, the question was raised, but not decided, whether a machine copy of a contract made in a broker's book, would be a sufficient writing within the statute of frauds. Parke, B. "It is not necessary to enter into the question whether the machine copy was sufficient, as the note itself was not signed by the defendant's agent. I am strongly inclined to think it is not, but it is not necessary to decide it."¶

[The bought and sold note, which is a copy of the entry in the broker's book, is not sent to the parties for their approbation, but to inform them of the terms of the contract, the entry made and signed by the broker being alone the binding contract. *Heyman v. Neale*, 2 Campb. 337. *Gale v. Wills*, 1 C. & P. 388, S. P. In the case of *Dickenson v. Lilwal*, 1 Stark. N. P. C. 128, the question arose whether the bought and sold notes made by a broker were sufficient to satisfy the statute of frauds, although he made no entry of the contract in his book; but although that point was reserved by Lord Ellenborough, yet as the counsel for the plaintiff elected to be nonsuited on another point that arose in the trial, the previous question never came under the consideration of the court. Where a broker, employed both by buyer and seller, negotiates a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract

arises. *Thornton v. Kempster*, 5 Taunt. 786. † *Cumming v. Roebuck*, Holt, N. P. C. 172. *Grant v. Fletcher*, 5 B. & C. 436. In the last case the entry made by the broker was not signed, and there was a variance between the bought and sold notes delivered. The following is the judgment of Chief Justice Abbott. "The broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the same contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes signed by the broker and delivered to the parties, although the book be not signed; but if the notes are imperfect, as in the present case, an unsigned entry in the book will not supply the defect. It is the duty of brokers to make the contract so as to be binding on both parties. They are employed to prepare contracts on which great sums of money depend; and I must say, that in many cases which have come before me, they appear to conduct their business in a very slovenly, negligent manner." In *Goom v. Affalo*, 6 B. & C. 117, it was decided according to the opinion so intimated, that the bought and sold notes duly signed were a sufficient memorandum of the bargain within the statute of frauds, though there was no corresponding entry in the broker's book. ‡ See *Hawes v. Forster*, 1 M. & Rob. 368, cited in *Townsend v. Drakeford*, 1 Carr. & Kir. 20, where Lord Denman, alluding to the first mentioned case, (*Hawes v. Forster*, of which there appears to be no report of the decision, *in banco*,) says; "After much consideration, and after consulting merchants we held, that the bought and sold notes were the contract, and not what is written by the broker in a book which nobody sees. If there is nothing but the book, we must go by that."§ So if, at the instance of the seller, and without the consent of the purchaser, a material alteration be made in the sale note by the broker, such alteration annuls the instrument so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered. *Powell v. Divett*, 15 East, 29.] † And see *Horsfall v. Fauntleroy*, Lloyd & Welsby, 340. Ante, p. 250. ‡ In *Gregson v. Ruck*, 4 Ad & Ell. 747, Lord Denman delivering the judgment of the court says; "The cases as to contracts made through the intervention of a broker acting for both buyer and seller are not clear: but they establish this point beyond all doubt, namely, that when the bought and sold notes differ in any material respect, there is no contract. Here they differ essentially; and therefore there was no contract of sale at all: there was indeed a delivery; but it was under a mistaken notion as to the existence of a contract which never did exist." And see, *Townsend v. Drakeford*, 1 Carr. & Kir. 20. A. having a quantity of wool to dispose of, placed a sample of it at a broker's for sale, and B. having examined the sample at the broker's office, purchased from A. in the presence of the broker, part of the wool at an agreed price, it being stipulated by B. that the

clerk, notwithstanding any usage *of trade, is not [*317] an agent within the statute without a special authority or assent.(h)

A memorandum, signed by an agent, thus, "Witness A. B., agent for the seller," is sufficient.(i)

SECTION 4.

Evidence of Contracts made by Agents.

After the authority is established, the next thing necessary, in order to recover upon a contract made by an agent, is to establish the contract itself by proof. It follows, from what has been already shown, that as to every thing which forms a part of the contract, the declarations of the agent, at the time of the contract, or upon which it is founded,

wool was to be delivered in *good dry condition*. On the same day the broker sent to A. a sold note of the contract, which however omitted all mention of the stipulation that the wool was to be in *good dry condition*, and no note whatever was sent to B. The wool was accordingly sent by the broker to B., who refused to receive it, on the ground that it was not in dry condition according to the contract. An action for goods sold and delivered having been brought to recover the price of the wool, the court sustained a verdict in favor of the defendant. Alderson, B. "If the party is authorized, one note may be enough, but the question is as to the authority. He is not the agent of both parties to make *this* contract; that is the difficulty which meets you everywhere. Two parties make a contract, and a third party, authorized by one of them reduces into writing a new and different contract." Rolfe, B. "Two parties meet and enter into a contract, and authorize another to draw it up, and he behind the back of one of them draws up a different contract, and never communicates to him that he has done so. Surely that cannot bind him." *Pitts v. Beckett*, 13 Mees. & Wels. 743, 751.||

(h) 9 Ves. 251. ||Ante, 176. But see *Bird v. Simmons*, 4 Barn. & Ad. 443. Ante, 160, n. (7).||

(i) *Coles v. Trecothick*, 9 Ves. 237. The memorandum there was, "Witness, E. Phillips, for Mr. Smith, agent for the seller;" but there was evidence of a particular assent by the seller to the agency of E. Phillips, which brings it to the same thing as stated in the text.

are equivalent in effect to those of the principal, and of course may be proved by parol evidence, or by the handwriting of the agent.(a) But declarations which [*318] do not *make any ingredient in the foundation of the contract are not evidence of the facts to which they refer; though those facts may be connected with the transaction. This was exemplified by a case where, in an action for the non-delivery of goods, the question was which party should supply the bags; and a letter of the agent, not cotemporary with the contract, but admitting that his principal was to supply them, was rejected.(b)

If the contract arise upon the payment of money, or the delivery of goods, it is sufficient to show that the money was paid, or the goods delivered to the agent of the party to be charged.(c)

SECTION 5.

Evidence of the Agent against his Principal.

The vendor of goods to a factor for the use of his principal may make the factor a witness.(a)

So in an action for money had and received, to charge a person with the receipt of money, the servant who received it is a good witness without a release.(b) It is, says

Lord Kenyon, the constant course of *nisi prius*, [*319] arising *ex necessitate*, to *admit the evidence of

(a) Ante, p. 256, &c. 10 Ves. 123; 5 Esp. Cas. 72, ib. 135; and see also 2 Esp. Cas. 145; 5 Esp. Cas. 145.

(b) Ante, p. 272. *Maesters v. Abraham*, 1 Esp. Cas. 375.

(c) Ante, p. 293. *Mathews v. Haydon*, 2 Esp. Cas. 509; *Jone v. Perchard*, ib. 507. || *Erick v. Johnson*, 6 Mass. Rep. 196.||

(a) Per Lord Hardwicke. It has been often so settled at Guildhall. *Snee v. Prescott*, 2 Atk. 248.

(b) *Mathews v. Haydon*, 2 Esp. Cas. 509.

clerks and porters, who are alone privy to the receipt of money or the delivery of goods.(c)

Where the question is, whether a person to whom money has been paid for the use of another, was an agent duly authorized to receive it, so as to charge the principal in an action † brought by him‡ for the money: it has been held that the authority may be proved by the agent himself. In an action of *assumpsit* it appeared, that the sum of money in dispute had been paid to B., who had been the agent of the

(c) *Ib.* and see post, 321. || As to the general rule that an agent or servant is *ex necessitate*, a competent witness for or against his principal, see *Cortes v. Billings*, 1 Johns. Cas. 270; *Mackay v. Rhineland*, Id. 408; *Jones v. Hake*, 2 Johns. Cas. 60; *Abbott v. Sebor*, 3 Johns. Cas. 39; *Renaudet v. Crocken*, 1 Caines' Rep. 167; *Burlingham v. Deyer*, 2 Johns. Rep. 189; *Stewart v. Kip*, 5 Johns. Rep. 256; post, 358; *Hudson v. Revett*, 5 Bing. 368; *Allen v. Coit*, 6 Hill, 318; *Ridgely v. Dobson*, 3 Watts & Serg. 118. One who borrows money as the assumed agent of another, drawing a bill upon his presumed principal for the amount, which is protested for non-acceptance, is not a competent witness for the lender, in an action by him against such principal for the money lent; but the principal is liable, if such money come to his use, and he recognize the loan by telling the agent he will pay it, though borrowed in the first instance without his authority. *Shiras v. Morris*, 8 Cowen, 60; ante, 4.|| Officers, secretaries, &c., of public companies are compelled to answer in equity. 3 P. Wms. 312; 1 Bro. Ch. R. 469; || 2 Story's Eq. Jurisp. § 1501; 3 Myl. & Cr. (Am. ed.) 525, n. 2. "It is the settled law, both in this country and in England, that in a bill against a corporation for relief, its officers and agents, who are cognizant of the facts to which it relates, may be made defendants for the purpose of obtaining an answer on oath, which cannot be obtained in any other way." Walworth, Ch. *Many v. The Beekman Iron Co.* 9 Paige, 193; *Vermilyea v. The Fulton Bank*, 1 Paige, 37; *The President &c. of the Fulton Bank v. The Sharon Canal Co.* Id. 219. Where a corporation is made a party to a suit in which it has no interest, and to which it ought not to have been made a party, an officer of the corporation who has no personal interest in the controversy, and who is not charged with any fraud or misconduct, cannot be compelled to answer matters as to which he is a mere witness. *Ellsworth v. Curtis*, 10 Paige, 105. And in a controversy between individual members of a joint stock company, an officer of the company cannot be made a defendant. *Seddon v. Connell*, 10 Sim. 58. An officer of a corporation made a defendant merely for the purpose of discovery, is entitled to costs for putting in his answer. *The Fulton Bank v. The New York and Sharon Canal Co.*, 4 Paige, 127.||

plaintiff, and, as the defendant alleged, continued to be so at the time when he received the money. The plaintiff admitted the receipt by B., but denied the agency ; to prove which, B. himself was proposed as a witness, and rejected ; but when the question was discussed on a motion for a new trial, which was applied for on the ground of B. being improperly rejected, the court were of opinion that the objection to B.'s admissibility was not well founded, because in any event the witness stood indifferent in point of interest between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant ; and that if such an objection were to prevail, it might exclude brokers who had effected policies of [*320] *insurance ; and that it would be difficult hereafter to draw any certain line ; and the rule for a new trial was granted.(d)

(d) *Ilderton v. Atkinson*, 7 T. R. 480. ¶ That the agent is competent to prove his own authority, see further ante, 277 ; *Rumball v. Wright*, 1 Carr. & Payne, 589 ; *Lowber v. Shaw*, 5 Mason, 241. “ The general principle that the testimony of agents and servants may be given without a release, is a very familiar one, and is not controverted by the counsel for the defendant ; but he denies the competency of one professing to have acted as an agent, to establish the fact of his authority by his own testimony. The principle as found in the elementary books, as well as in the reported cases, seems to be broad enough to support the position, that in an action against the principal, the authority of the agent to act, may be proved by the agent himself.—These authorities directly affirm the competency of the agent to prove his agency. The principle of the rule as stated, is this, that in any event the witness is indifferent in point of interest, being liable to account with the defendant if he received the money, as agent, and to the plaintiff, if he did not so receive it.” *Dewey, J. Rice v. Gove*, 22 Pick. 160.¶ *Quære*, whether an agent would be permitted to prove that he had acted within his authority in making a contract, since he would be liable personally to the plaintiff if he had exceeded it ; and the reason of necessity does not apply.

[In the case of *Gevers v. Mainwaring*, 1 Holt, N. P. C. 139, this question arose ; and it was ruled by Gibbs, C. J. that the agent was not a competent witness without a release. In the case of *Ilderton v. Atkinson*, it was objected that B. had a stronger interest to give evidence in favor of the defendant than of the plaintiff, since if he had received the money under a misrepresentation of his own character, the defendant might recover from

*Thus also, in an action against the owners of [*321] a ship for money borrowed by the captain, the latter was held by Lord Kenyon, to be a good witness for the plaintiff to prove that the money was borrowed for the use

him the costs of the action then depending, as well as the money: but the court held, that the possibility of such a remote interest did not render him incompetent. And upon the authority of this case it was held in that of *Birt v. Kershaw*, 2 East, 458, that a liability to pay, in the event of one party failing, the costs of the action in addition to the money recovered, for which he would have been liable either to the one or the other, did not affect the competency of the witness. The authority of these cases has, however, been considerably shaken in more modern times. In the case of *Jones v. Brooke*, 4 Taunt. 464, which was an action against the acceptor of a bill accepted for the accommodation of the drawer, the Court of Common Pleas held, that the drawer was not a competent witness for the defendant to prove that the holder received the bill on a usurious consideration, on the ground that he was bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation, and would therefore be liable to the acceptor, not only for the principal sum, but also for all the costs with which he might be charged in the action. So in the case of *Townend v. Downing*, 14 East, 567, in which that of *Ilderton v. Atkinson* was cited, as having decided that a liability to pay costs did not affect the competency of a witness where he was liable to an action in either event of the cause, Lord Ellenborough asked "Why there should not be an interest in costs, as well as on any other account." See also *Harman v. Lasbrey*, 1 Holt's N. P. C. 390, S. P.] † And upon the principle so laid down, it is suggested by Mr. Phillips, in his Treatise on Evidence, 7th edition, p. 62, that the case of *Ilderton v. Atkinson* must be considered as overruled, and that a witness in such a situation would not stand indifferent between the parties. In *Edmonds v. Lowe*, 8 B. & C. 407, the court decided, on the same ground, that the acceptor of a bill of exchange was not a competent witness for the drawer in an action by an endorsee, to prove that he (the acceptor) had received the bill from the drawer for the purpose merely of procuring it to be discounted for the use of the drawer, and that he had delivered it for that purpose to the plaintiff, who had immediately appropriated it to his own use in discharge of a debt owing from the acceptor to him. But the rule does not extend to an endorser, for he could never recover from the acceptor the costs of defending an action brought upon the bill. *Dawson v. Morgan*, 9 B. & C. 618.‡ || As to incompetency arising from liability for costs, see *Lupton v. Lupton*, 2 Johns. Ch. Rep. 626; *Whipple v. Lansing*, 3 Johns. Ch. Rep. 612; *Neilson v. McDonald*, 6 Johns. Ch. Rep. 205; *Eckford v. De Kay*, 6 Paige, 569; *Edwards v. Goodwin*, 10 Sim. 124; *Soulden v. Van Rensselaer*, 9 Wend. 296; *Hathaway v. Crocker*, 7 Metc. 264; 2 Steph. N. P. 1735.¶

of the ship, and not for his own use. It was objected, that he came to discharge himself by throwing the *onus* upon the owners : but it was answered, that the owners had a remedy over against him, if the money came to his hands, and that he was therefore indifferent.(e)

But in an action on a policy of insurance for a loss by barratry, the captain is not a competent witness [*322] to prove that the barratry was with the consent of the owners, without a release from the underwriters ; because he is liable to them if the plaintiff recover.(f)

No agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except counsel and attorneys.(g)

(e) *Evans v. Williams*, Guildhall Sittings after Tr. T. 28 Geo. II. B. R. 7 T. R. 481. || *Rocher v. Busher*, 1 Stark. 27.||

(f) *Bird v. Thompson*, 1 Esp. Cas. 339. Lord Kenyon gave this as the reason for rejecting the evidence of the captain ; and said, that though he knew of no action of that sort ever having been brought, yet he conceived that wherever a man acted contrary to his duty, whereby another received damage, or was rendered responsible or liable to damage, he might maintain an action *ex delicto*, against the person who had so subjected him. † See also *Corking v. Jarrard*, 1 Campb. 37 ; *Clarke v. Shee*, Cowp. 199 ; *Green v. New River Company*, 4 T. R. 589 ; *Bird v. Thompson*, 1 Esp. N. P. C. 339 ; *Miller v. Falconer*, 1 Campb. 251 ; *Cuthbert v. Gostling*, 3 Campb. 515.†

(g) 4 T. R. 431. || Where an attorney is employed by a client professionally, to transact professional business, all the communications which pass between them in the course, and for the purpose of that business, and not those only which relate to litigation commenced or in contemplation, are privileged communications. *Herring v. Cloberry*, 1 Phillips, 91. But a communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause. *Bramwell v. Lucas*, 2 Barn. & Cr. 745. As to the immunity of counsel &c.—which however is rather to be deemed the privilege of the client,—see further *Greenough v. Gaskell*, 1 Myl. & K. 98 ; *Desborough v. Beetham*, 3 Myl. & Cr. 515 ; *Jones v. Pugh*, 1 Phillips, 96 ; *Carter v. Palmer*, 1 Dru. & Walsh, 746 ; *Clagett v. Phillips*, 2 Yo. & Coll. C. C. 82 ; *Stuyvesant v. Peckham*, 3 Edw. Ch. Rep. 579 ; 2 Steph. N. P. 1762, et seq. and cases there cited.||

CHAPTER IV.

RIGHTS OF PRINCIPALS FROM THE ACTS OF THEIR AGENTS.

SECTION 1.

1. As an employer is bound by the contracts and acts of his representative, so he may take advantage of them. It is said in an old authority, "the master shall have advantage of his servant's contracts, in the same manner as he shall be bound by them, as to those matters which come within his compass as a servant; as where a servant was sent by a master to a debtor, and appointed by him *ad componendum et agreandum* the money due from the debtor; and there being a promise made to the servant to pay what was due upon the balance and agreement, it was held, that the master might maintain an action in his own name on the promise to his servant as upon a promise to himself."*(a)*

But this is only under such circumstances as afford room to presume an authority; for where the evidence was that the defendant had agreed *with the plain- [*324] tiff's servant to pay him half price, which the servant was to have to his own use, this, it was held, would not maintain the action, for there arose no contract to the plaintiff.*(b)*

It is a maxim which is daily acted upon, that if a factor

(a) *Seignior v. Walmer*, Godb. 360.

(b) Per Holt, *C. J. Thorp v How*, Bull. N. P. 130.

sells goods for his principal, the action may be brought either in his own name, or in that of the principal.(A) And

(A) || Post, 361, et seq. A principal whether foreign or domestic, may sue in his own name to enforce rights acquired by his agent in a course of dealing for the former ; and this, though the agent dealt without disclosing his principal : but the defendant is not by the mere form of the action to be cut off from any equities he may have against the agent. *Taintor v. Prendergast*, 3 Hill, 72. So, in another case it was held, that on sales made by a factor, the principal may recover the price due by the vendee, subject to the equities which the vendee has acquired by dealing with the agent as principal, or which the agent may have acquired from the course of dealing between him and the vendee : but this rule does not apply to a sale made by a factor here, for a principal in a foreign country, where exclusive credit is given to and by such factor ; nor can a suit be sustained by the principal, except through and by the factor ; and on the bankruptcy of both principal and factor, the assignee of the latter is entitled to the price of the goods sold. *Merrick's Estate*, 5 Watts & Serg. 9 ; S. C. 2 Ashmead's (Penn.) Rep. 485. So, a proctor may recover for business done for the defendant by his clerk, although the defendant apprehended that the clerk was the principal, he acting as the principal, and never disclosing the name of his employer, provided no prejudice arises to the defendant from the concealment. *Grojan v. Wade*, 2 Starkie, 443. As to the right of the principal to sue upon the sale, or other contract of his agent, see further *Walter v. Ross*, 2 Wash. C. C. Rep. 283 ; *Leverick v. Meigs*, 1 Cowen, 646 ; *Kelley v. Munson*, 7 Mass. Rep. 319 ; *Girard v. Taggart*, 5 Serg. & Rawle, 19 ; *Hogan v. Shorb*, 24 Wend. 461 ; Post, 335, et seq.

Upon a sale made through the intervention of an auctioneer, the owner may maintain an action in his own name against the vendee, although his name be not mentioned in the auctioneer's entry of the memorandum of contract of sale. *Hicks v. Whitmore*, 12 Wend. 548 ; ante, 160, n. (q). But in general, an action upon an express written contract entered into by an agent in his own name, must be brought by the agent and not by the principal. " Courts of law," says Livingston, J. " out of their great solicitude to protect the interest of a principal, have gone great lengths in identifying him with his agent or factor, and as a necessary consequence have permitted a suit in his own name, although he be not, except by implication of law, a party to it. But the court does not know that such suit was ever sustained on the contract itself, where one in writing took place between the factor and vendor, in which the name of the principal did not appear. What use might be made of such a paper, as matter of evidence, is one thing ; but that a suit can be brought upon it in the name of any but a party to it, has not been shown ; nor is it believed that such is the law. Without then disturbing any of the cases of this class which

have been referred to, this court cannot, when sitting as a court of law say, that an express and written promise to do a thing to Rainy or Wolcott, is a contract to do the same thing to the United States. It looks in vain to the writing itself for such an engagement; and that is the only source from which it has a right to make its deductions. It is on that which the plaintiffs have relied, and if they do not succeed in showing an *assumpsit* there, they fail in their action altogether." *The United States v. Parmele*, 1 Paine's C. C. Rep. 258. So it was held that it was not competent to show by parol that the promisee was the agent of another person, for the purpose of enabling such person to maintain an action in his own name on the agreement. Jewett, J. "The rule in regard to parties to actions seems to be, that every action on an express contract must be brought in the name of the person to whom the engagement violated was originally made, unless it is transferable, as a negotiable note, &c. In the present case, the promise or agreement is expressly made with Peters; Clark's name does not appear in the writing. It was not competent to contradict or amend the agreement by parol proof, by substituting Clark's name as the promisee in place of Peters." *Newcomb v. Clark*, 1 Denio, 226.

The case of an action on a policy of insurance effected by a broker, when not under seal, is an exception to the rule. Post, 362. And the case of negotiable paper is another exception.—Where a promissory note was made payable "to the cashier of the Commercial Bank" or his order and the consideration proceeded from the bank, it was held, that an action on the note might be maintained in the name of the bank as the promisee. Dewey, J. delivering the opinion of the court said: "The note is in terms payable to 'the cashier of the Commercial Bank;' and the defendant contends, that the action should have been brought in the name of the person who was then cashier, and will not lie in the name of the corporation. It is not denied that the property of the note is, and ever has been in the plaintiffs; but the argument is, that the promise being in the name of the cashier, although made to him in trust, and for the benefit of the corporation, it can only be enforced in his name.—It is a familiar rule of pleading, that contracts must be declared on according to their legal import and effect, rather than their literal form. We should, therefore, first seek the true import of the contract under consideration. If it be in truth a promise to the individual who was cashier when it was made and not to the corporation, it is very clear that the plaintiffs cannot maintain this action. For he alone to whom a promise is made, or in whom its legal interest is vested, can enforce its performance, or complain of its breach. A contract may be made to or with a person, as well by description as by name. And when the parties can be ascertained, it will be valid, although their names be mistaken or their description be incorrect. It cannot be doubted that a note to the *Commercial Bank* would be valid and might be declared on as a promise to the plaintiffs, although their legal name is 'The President, Directors and Company of the Commercial Bank.' So a contract with the *stockholders*, or with the *president and directors*, or with the *directors of the Commercial Bank*, would doubtless be, in its legal

in the latter case the principal has the benefit of the factor's evidence.(c)

And though the agent act by a *del credere* commission, which makes him liable at all events to his employer,(1) yet the responsibility of the buyer to the employer is not altered by that circumstance.(d)

Contracts made for the benefit of another, but without his privity or direction, may be rejected or affirmed at his election.(2) But by making the election to affirm it he

effects, a contract with the corporation. It is not easy to perceive why a contract with the cashier of a bank is not a contract with the bank itself. A corporation being an incorporeal being and having no existence but in law, can neither make nor accept contracts, receive nor pay out money, but by the agency of its officers. They are the hands of the corporation by which they execute their contracts and receive and make payments. Of these officers the cashier is the principal. If the note had been made to the corporation, by its appropriate name, the same officer would have demanded or received payment, or would have given notice of non-payment and protested it, and, had it been negotiated, would have made the indorsement, and in precisely the same form as he would upon this note.—The principle is, that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation, whether a right or a wrong name, whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation. And there is no so safe criterion as the consideration. If this proceed from the corporation, it raises a very strong presumption that the promise is made to them. If no express promise be made, but it be left to legal implication, it must be to them." *The President, &c., of the Commercial Bank v. French*, 21 Pick. 486.||

(c) 1 Atk. 248. || Post, 358.||

(1) † See ante, p. 111, n. (3) †

(d) *Grove v. Dubois*, 1 T. R. 113. 4 B. Ab. 602, Merchant (B). Ante, 111, (3). || *Leverick v. Meigs*, 1 Cowen, 646, 664.||

(2) [In the case of *Routh v. Thompson*, 13 East, 274, where a person made an insurance for the benefit of A. without his knowledge, it was held that A. might subsequently ratify it, and the insurance would enure to his benefit upon the principle that *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*. See also *Hagedorn v. Oliveron*, 2 Maule & Selw. 485, S. P.] || The plaintiff in this case was a general agent for a merchant residing at Carthage, who was in the practice of making shipments to New York. On the 19th of February 1827, the plaintiff without any orders from his principal, caused an open policy of insurance for \$5000 on goods laden or to be laden on board any vessel from Carthage to New

adopts the agency altogether, as well that which is detrimental, as that which is for his benefit.(e)

*2. But in seeking to enforce contracts entered [*325] into by agents, the principal is subject to have them impeached by any conduct of his agent, which would have had that effect if proceeding from himself. Every

York, on account of his principal, to be executed by the defendants who received the premium. Previously, on the 17th of February, the agent had written to his principal informing him of his intention to effect said policy; and on the 23d of March following, the principal replied to his letter, and conditionally affirmed his act. On the 21st of February, two days after the policy was effected, a loss occurred by the perils insured against, on goods shipped by the principal on board of a vessel from Carthagena to New York. It was held that they were covered and protected by the policy; that the defendants having contracted with the agent for the express benefit of the principal, and having received the premium, could not be permitted to show any want of authority in the agent, and that the principal having adopted the act of the agent, could enforce the contract in the name of the agent. *Bridge v. The Niagara Ins. Co. of New York*, 1 Hall, 247. And see ante, 171; *Taylor v. Salmon*, 4 Myl. & Cr. 134, 139; *Shaw v. Nudd*, 8 Pick. 9; 1 Liv. Pr. & Ag. 52.||

(e) *Wilson v. Poulter*, 2 Str. 859. || *Benedict v. Smith*, 10 Paige, 127; ante, 172, 175; *Kelly v. Munson*, 7 Mass. Rep. 323.|| † It is on this principle that actions of tort are converted, as they frequently are, into actions of contract. The party injured (as by an unlawful conversion and sale of his property) may waive all complaint of the wrong done him by the conversion, and may adopt the sale as made for his benefit; but if he do so, his damages will be limited by the proceeds of the sale, however short of the actual value of the property. And see ante, 172, et seq. ‡ || “ In many cases of the illegal conversion of property by a third person, as well as by his agent, the principal may have an election of remedy; as for example, in the case of a tortious sale, he may waive the tort, and maintain an action for the proceeds of the sale; or he may bring trover against the wrong-doer. Sometimes the one course is more desirable than the other; but it is so, only when the interests of the principal may be enhanced thereby. Thus, if the wrong-doer has sold the goods of the principal for a high price, it will be most favourable to the latter to pursue his remedy for the price or proceeds. On the other hand, if the goods have been sold at an under value, then an action of trover would be the more beneficial remedy, as the principal would be entitled to recover the full price or value of the goods.” Story’s Agency, § 439; *Kelly v. Munson*, 7 Mass. Rep. 323.||

species of fraud, misrepresentation, or concealment, therefore, in the agent affects the principal's right to recover.(f)

3. Moreover, if an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him as if he were in fact the principal.(A) So that, under these circumstances, he may set off against the demand of the principal, a debt due from the factor to himself.(3)

[*326] *It has been seen(4) that a purchaser is discharged by payment to a factor, unless where notice has been given by the principal not to pay him : and that the payment, even after such notice, is warranted in the following cases. 1st. Where the factor acts under a *del credere* commission, in which the principal gives credit to him, and he to the buyer.(5) 2d. Where the factor has a lien upon the price for his balance, which entitles him to receive the payment. These seem to be the only cases in which a purchaser, dealing with a factor, *and being aware of his representative capacity*, can safely *pay* the price to him after notice from the principal ; but if a buyer deal with a factor or broker wholly in his own name, and without knowledge of any other person being a party to the

(f) Ante, 194, 303. † *Earl of Ardglass v. Muschamp*, 1 Vern. 239.†

(A) ‖ *Westwood v. Bell*, 4 Campb. 349 ; stated at some length, ante, 151, n. (19). Where an agent employed to collect money in New York, and to remit it to the principal, lent it there to the defendants, to whom he was indebted in a sum larger than the amount lent, telling them that he could lend it until he should be ready to return home, but without informing them that the money belonged to his principal, it was held, that the defendants could retain the money as against the principal, even after notice that it belonged to him. *Lime Rock Bank v. Plimpton*, 17 Pick. 159.‖

(3) [On the same principle it has been decided, where an auctioneer sold the goods of B. as the goods of A., and the buyer (without notice from the auctioneer not to pay A.) took the goods with the auctioneer's assent, and paid the price of them to A., that the auctioneer could not afterwards maintain an action for the price. *Coppin v. Walker*, 2 Marsh. 497 ; 7 Taunt. 237, S. C.]

(4) † Ante, p. 278.†

(5) † Not so, see ante, p. 111, n. (3).†

contract, he is entitled, in the absence of collusion, to regard the debt as due to the factor or broker, so as in an action brought by the principal, to set off a debt due from the factor to himself, or to defend himself by a payment to him.(g) This question is distinct in principle from that just adverted to, of *payment* to a factor having a lien upon the price. There the indemnity is founded upon the title of the latter to receive the money; and therefore it is indifferent whether or not the buyer knew at *the time of contracting that he was dealing with [*327] an agent;(6) whereas the right now spoken of is the right of the debtor, and is built upon this principle, that where the buyer has been led to contract under an impression that his contract is with one person, he cannot afterwards be defrauded of the rights which he has against that person by the introduction of a third to whom he was a stranger; and therefore this right can only exist in those cases where the purchaser deals with the agent as a principal.(h)

(g) Post, || p. 329; 2 Kent's Comm. 632; *Merrick's Estate*, 2 Ashmead's (Pa.) Rep. 485; *Taintor v. Prendergast*, 3 Hill, 72.||

(6) *Hudson v. Granger*, 5 B. & A. 27, ante, p. 287, 288.

(h) This principle is collected from the case of *Stracey and others v. Decy*, London Sittings after Mich. 1769, 7 T. R. 361, which, though not a case of principal and agent, does not seem the less applicable to the present purpose. *Assumpsit* for goods sold; pleas, *non assumpsit* and set-off. The plaintiffs jointly carried on trade as grocers: but *Ross* was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, *Ross* was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker; and being indebted for grocery (as he confessed) to *Ross*, he effected insurances and paid premiums on account of *Ross* solely, to the amount of his debt; under the idea that one demand might be set off against the other. Payment of the money due from the defendant was demanded by the firm; and was refused by him on the ground of his having been deceived by the other partner's keeping back, and holding out *Ross* as the only person concerned in the trade. Lord Kenyon, C. J. was of opinion, that as the defendant had a good defence by way of set-off as against *Ross*, and had been, by the conduct of the plaintiffs, led to believe that *Ross* was the only person contracted with, they could not

[*328] *In an action for goods sold to the defendant by
 [*329] the owner's factor, the defendant set off a debt *due
 to him from the factor upon another account, al-
 leging that the plaintiff had not appeared at all in the
 transaction, and that credit had been given by the factors
 and not by the plaintiff. Lord Mansfield delivered his
 opinion as follows: Where a factor, dealing for a principal,
 but concealing that principal, delivers goods in his own

now pull off the mask and claim payment of debts supposed to be due to *Ross* alone, without allowing the party the same advantages and equities in his defence that he would have had in actions brought by *Ross*. Verdict for defendant. † The same principle is acted upon in actions *against* partners. Thus, to an action against two partners upon a bill of exchange, drawn upon and accepted by *Saunders, Brothers, & Co.* London, the defendants pleaded in abatement that there were other partners who ought to have been joined. On the issue raised by this plea, Lord Tenterden left it to the jury to say whether the plaintiffs had reason to suppose that the two defendants constituted the firm in question at the time when the contract was made, and the answer being in the affirmative, a verdict was taken for the plaintiffs. The case was subsequently brought before the court, and it was there decided that the direction was right—that the question was, with whom was the contract made—that where the transaction was with a firm in which there were secret partners, the existence of whom became known to the party dealing after the contract and before payment, *he had his choice* to sue either those only with whom he contracted, or the whole firm—and that the case of *Dubois v. Ludert*, 5 Taunt. 609, in which the contrary had been held, was not good law. *De Mautort v. Saunders*, 1 B. & C. 398. In the case of *Ex parte Norfolk*, 19 Ves. 455, Lord Eldon stated, that such had been the practice in bankruptcy for the last thirty years—"It has," said he, "been taken as unquestionable that if I deal with A., he cannot with reference to that transaction, say there is a contract between him and B., of whom I know nothing; thus compelling one to be a joint creditor of those two, whose joint property may be scarcely anything, and not the sole creditor of the only man I knew. I have said in this place, following a series of precedents, that the joint creditors may elect: that a man *purchasing from, or selling to A., not knowing of any partner*, may consider A. as the sole vendor or vendee. He may, finding that B. has taken a share of the profits, elect to go against him also, but he cannot be compelled certainly." † ¶ A part owner of a vessel who orders supplies on his own account, without mentioning any co-part-owners, cannot plead in abatement that there are co-part-owners, who ought to have been joined, the plaintiff being ignorant that there were other part-owners. *Baldney v. Ritchie*, 1 Stark. 338. ||

name, the person contracting with him has a right to consider him to all intents and purposes as the principal. And though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled.⁽ⁱ⁾ On a later occasion this opinion was made the ground of a judgment by which the law is established upon this head. This was in the case of *George against Clagett*. The plaintiff, a clothier, employed certain persons as his factors under a *del credere* commission, who, besides acting as factors, bought and sold great quantities of woollen cloths on their own account; and all their business was carried on at one warehouse. The defendants being at that time the holders of a bill accepted by the factors, which they had received in the course of trade, bought *cloths of the [*330] factors at twelve months' credit, which were taken out of one general mass in the factor's warehouse. The bills of parcels of the whole were made out in the factors' names, and the buyers did not know that any part of the goods belonged to the plaintiff. The factors having failed, the defendants received notice from the plaintiff that part of the goods bought were his property; and the question was whether the defendants were entitled to set off their demand against the factors on the bill of exchange, on the ground that the defendant dealt with them as principals;

(i) 7 T. R. 360,^(a). *Rabone, jun. v. Williams*, Middlesex Sittings after Mich. 1785. In *Bayley v. Morley*, London Sittings after Mich. 1788, Lord Kenyon recognized the law of this case, *id. ib.* || But "if the agent appointed to collect a debt, is indebted to the debtor, the latter cannot offset, against the debt due from him to the principal, claims against the agent. It cannot be contested. No man ever thought, that a person who employs an agent to collect his debts, by this agrees to take on his hands the debts owing by his agent to his debtors, instead of looking to the original debtors themselves." Marshall, *C. J. Wilson v. Codman's Ex'rs.*, 3 Cranch, 204.||

and upon the authority of the case just referred to it was determined that they were.(k)

But circumstances which show collusion between the factor and buyer, as the insolvency of the factor known to the buyer, would defeat the right he would otherwise have.(l) This right depends upon the ignorance of the contracting party as to the real character of the person with whom he deals; and therefore has been held not to enable a person, effecting a policy of insurance by the direction of one whom he knew to be an agent, to withhold the money recovered upon the policy, on account [*331] of a debt due to him from the *agent; and it was thought a sufficient intimation of the agent's character that he, in a time of war, being an English subject, described the ship as *neutral*.(m) And although the buyer, at the time of making the contract of sale with a factor, be not apprized of his representative character; yet if at any time before the contract be completed by the delivery of all the goods, and even after the delivery of part, he come to the knowledge of the principal, he cannot avail himself of a set-off against the factor. But he might in this case be discharged by paying the factor, if not prevented by notice from the principal.(n) The mere general knowledge, however, of the seller being a factor is not sufficient to deprive the buyer of the privilege of set-off, without express knowledge that he acts as agent in that particu-

(k) 7 T. R. 359. The fact of the factor having a *del credere* commission does not appear to have weighed in the judgment, though mentioned in the case. || And see *Wright v. Snell*, 5 Barn. & Ald. 350; *Carr v. Hinchliff*, 4 Barn. & Cr. 547.||

(l) *Escot v. Milward*, 7 T. R. 361,(b).

(m) *Maans v. Henderson*, 1 East, 335. || If the insurer knows that a policy, though in the name of a broker is in fact effected on account of another, a set-off of a debt due from the broker, cannot be made in a suit by him on that policy, though it be carried on in his own name. *Gordon v. Church*, 2 Caines' Rep. 299. But the premium note may be deducted, whether given by the agent or principal. *Hurlbert v. The Pacific Ins. Co.*, 2 Sumn. 471; and see *Leeds v. The Marine Ins. Co.*, 6 Wheat. 565.||

(n) *Moore v. Clementson*, 2 Campb. N. P. C. 24.

lar instance, because a man who is in the habit of selling for others may likewise sell goods of his own.(o)

‡ The case of *Baring v. Corrie*, which has been already alluded to,(8) strikingly illustrates the principle and limits of the doctrine now under consideration. The question was, whether the purchaser had a right to set off against the claim of the vendor, a debt of the broker, by whom the sale had been effected. *And it was [*332] said by Bayley, J., that upon this three questions arose: "1st, Did the plaintiffs (the vendors) enable Coles & Co. to appear as proprietors of the goods and to practise a fraud upon the defendants (the purchasers)? 2dly, Did Coles & Co. actually practise a fraud? and 3dly, Did the defendants use due care and diligence to avoid such fraud?"—in other words, were the purchasers misled into a belief that they were dealing with Coles & Co. as principals, and if they were misled, was it by the fault of the principals in enabling the brokers so to mislead them, or by their own fault in not instituting proper inquiries—all which questions being answered against the defendants, the plaintiffs had judgment.(9)

It will be seen, on reference to the report of that case, that much stress was laid on the difference of character of broker and factor. "The distinction," says Abbott, C. J., "between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are conveyed for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal: the latter therefore, with full knowledge of those *circumstances, trusts him with the [*333] actual possession of the goods, and gives him au-

(o) Ibid.

(8) ‡ Ante, p. 288.‡

(9) ‡ 2 B. & Ald. 137. The facts being somewhat long and special, and the case itself important, it has been thought advisable to retain in this edition the report given in the appendix to the last edition; see Appendix.‡
|| And see ante, p. 13, n. A.; post, p. 334, n. 10.||

thority to sell in his own name. But the broker is in a different situation, he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not ; and at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker : for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether.”†

To these the following case may be added, as falling under the same principle. The defendant was a person whose business it was to receive money for cattle sold in Smithfield from the purchaser. To an action brought by the owner of cattle sold for the money so received by the defendant, the latter claimed to set off a debt due from the salesman to himself. Evidence was offered to prove, that by the universal custom of the market, the defendant was considered as the *debtor of the salesman, and not of the owner, with whom he had no connection. But Lord Kenyon refused the evidence, declaring no custom could deprive the plaintiff of that which by the law of the land he was entitled to receive ; and laid particular stress upon the defendant’s knowledge, that he received the money for the use of another ; which he said distinguished the case from that of a banker receiving money from a factor whose principal he had never heard of.(p)
† And so it is in the case of an underwriter—he cannot, as we have seen, set off a debt from the broker against the

(p) Peak’s Ni. Pr. Cas. 177.

loss due to the assured, however usage may have sanctioned such a course of dealing.(10)†

(10) † Ante, p. 281 et seq. ‡ || p. 331 n. (m.) When goods belonging to his principal were sold by a factor without knowledge of the ownership on the part of the purchaser, the latter in an action on the contract by the principal, for the price of the goods, was held entitled to set off a demand against the factor, although the sale was a cash sale, and the purchaser when he obtained the goods, did not intend to abide by his contract, but purposed to set off his demand against the factor. And it was further held, that the purchaser in this case was entitled to his set-off, although it consisted of a note of the factor not due until forty-five days after the sale, the principal not having commenced his suit until after the maturity of the note. Bronson, J. "If Morris (the factor) had brought the action the set-off could not have been resisted. How stands the case with the plaintiff? When the sale is made by a factor, an action for the price may always be brought by the principal, as well as by the agent; and the rule is the same, although the agent act under a *del credere* commission. But the principal by suing in his own name, cannot defeat the existing equities between the vendee and the factor, unless they are chargeable with collusion, or there has been some act on the part of the vendee which operates as a fraud upon the owner of the property. The same principle applies where one of several partners is permitted to act, and hold himself out to the world as though he were the only person interested in the business. He cannot, by uniting the name of the sleeping partners in a suit against a third person, defeat a set off which would have been available had he sued alone. In *Baring v. Corrie*, [supra, p. 331,] the sale was made by a *broker*, and in an action by the principal, the vendees were not allowed their debt against their agent. But the case turned principally on the distinction between a *factor*, who is usually entrusted with the goods and sells in his own name, and a *broker*, who is not usually entrusted with the goods, and ought only to sell in the name of his principal; and stress was laid on the fact, that the plaintiffs had not enabled the broker to impose on third persons, by entrusting him either with the possession of the goods, or the muniments of their title.—When the name of the principal is disclosed at the time of the sale, the vendee has no right to set up any equities between himself and the factor to defeat the action of the owner; and the same consequence will I think follow, if the vendee knew or had good reason to believe he was dealing with the agent of another, although the name of the principal was not disclosed. But a mere general knowledge that the person selling the goods is a factor, if he also carry on business on his own account, will not be sufficient to charge the vendee with notice. He must know, or have good reason to believe, that the vendor is acting as the agent of some other person in that particular transaction." *Hogan v. Shorb*, 24 Wend. 458, 461.¶

It is clear, that a principal can never be allowed to set off a debt due to him from his own broker, against the demand of one with whom he has contracted through the medium of the broker.(q)

It should be observed, that where the principal resides abroad he is presumed to be ignorant of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties.(r)

4. Upon the same principle that a party contracting with a factor, as principal is entitled to the same [*335] right of set-off in an action by the *principal that he would have had in an action by the agent, he may also discharge himself in such action by any payment to the agent, which would have operated as such to the principal.(s)

SECTION 2.

The right of a principal to recover money or goods paid, or wrongfully transferred by an agent, is next to be considered.

Money paid by an agent may be recovered back by the principal under any of the following circumstances, 1st. Where the consideration fails. If an agent make a deposit on a treaty for a purchase conducted by him in his own name, and without disclosing his principal, the latter may nevertheless, upon the failure of the seller to fulfil the bargain, recover it in his own name.(a) And when an un-

(q) *Waring v. Favenc*, 1 Campb. 85.

(r) *Paterson v. Gandasequi*, 3 Bos. & Pul. 489; 15 East, 64; || ante, p. 248, n. (5).||

(s) *Coates v. Lewes*, 1 Campb. N. P. Cas. 444. || Ante, p. 279, 326.||

(a) *Duke of Norfolk v. Worthy*, 1 Campb. N. P. C. 337. || Where money is deposited with a stakeholder on the event of a wager, by a person who acts as agent for several others, but the stakeholder is ignorant of the principals on whose account the money is deposited, actions to recover back

derwriter had subscribed a policy effected by an insurance-broker for his principal, and in the policy "confessed himself paid the premium," he was not allowed, in an action by the principal for a return of premium, to allege that no money had been paid by the broker to him. For by the usage of that business, running accounts are kept between the underwriter and the brokers, and no money paid at the time by *the latter. And it was said [*336] by Lord Ellenborough, that if a man acknowledge that he has received a sum of money from the broker, and accredit him with the principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him.(b)

2dly, Where money is paid by an agent through mistake. Thus, where the amount of a bill specially endorsed by the payee was paid by the drawer's agent to a subsequent endorsee, and it afterwards turned out that the payee's endorsement was a forgery, the drawer recovered the money back in his own name(c) from the person to whom the agent had paid it.

3dly, If money be illegally extorted from an agent in the course of his employment, the principal may sue for it. A case of this nature occurred in the instance of an over-charge made upon a master of a ship, at the Custom House, for fees (the payment of which is imposed personally upon the master): an action was brought *by [*337]

the deposit are properly brought in the name of the principals, (each of whom separately may sue for his respective proportion,) and not of the agent. *Yates v. Foot*, 12 Johns. Rep. 1; *Vischer v. Yates*, 11 Johns. Rep. 23, 28.||

(b) *Dalsell v. Mair*, 1 Campb. N. P. C. 532. And see *Power v. Butcher*, 10 B. & C. 329; *Lloyd and Welsby*, 115.

(c) *Anchor v. The Bank of England*, Doug. 637, † and see the cases of *Treuttel v. Barandon*, 8 Taunt. 100; *Sigourney v. Lloyd*, Dan. & Lloyd, 132, supra, p. 237; ||S. C. 8 Barn. & Cr. 622; 5 Bing. 525;|| from which it appears that where a bill specially endorsed to an agent, has been discounted or otherwise paid away by him, the principal may recover the bill in an action of trover, or the money received for it in action of *assumpsit* for money had and received to his use.‡

the owners for the over-payment, in which they were nonsuited, upon the ground that the action would only lie by the master who paid the money. But the nonsuit was set aside; and the court declared there was no doubt, that where a man pays money by his agent which ought not to have been paid, either the agent or the principal may recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent.(d)

4thly, Where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose, it may be recovered back by the principal from the fraudulent holder, if it can be clearly traced, and by that means shown to be his, as in the following case. The plaintiff's clerk, who was employed by him to receive money, applied various sums, as well as several negotiable notes so received, in the insurance of lottery tickets prohibited by stat. 12 Geo. III. c. 46. In an action for money had and received, the money was actually traced from the customers to the defendant through the clerk, and [*338] the plaintiff recovered.(e) Upon the first impression Lord Mansfield was of opinion against the plaintiff, thinking that the master could not stand in a better situation than the servant, and that the servant was clearly *particeps criminis*.(f) But, though he retained his opi-

(d) *Stevenson v. Mortimer*, Cowp. 805. If a servant be cozened of his master's money, the master may have an action on the case against the cozenor, Roll. Abr. 98. Cro. Jac. 223. So an action lies by a master against the hundred, if his servant be robbed of his money, Cro. Car. 37. || So, if goods consigned to a commission merchant for sale, and on which he has a lien for a balance due to him from the owner, are attached as the property of the factor, the owner of the goods may maintain trespass against the officer who made the attachment. *Holly v. Huggefurd*, 8 Pick. 73. ||

(e) *Clark v. Shee*, Cowp. 197.

(f) Perhaps upon the authority of the case of *Jaques v. Golightly*, 2 Bl. 1073, it would now be held that the clerk might recover; † which was decided on the ground that although the insurance was rendered void by the statute, there was no illegality on the part of the insurer; † but the circumstance of Lord Mansfield's having entertained this opinion makes this judg-

nion as to the servant's inability to recover, he changed it as to the master's right ; for he says, the plaintiff does not sue as standing in the place of his clerk ; he sues for his identified property, which has come to the hands of the defendant iniquitously and illegally.(1)

Where money or notes are paid *bona fide*, and upon a valuable consideration, they never can be brought back by the true owner. But where they come *mala fide* into a person's hands, they are in the nature of specific property ; and if their identity can be traced and ascertained, the party has a right to recover.(g) In the case just mentioned, the

ment an authority for the principal's right to recover even in those cases where the servant, by reason of his being in *pari delicto*, could not.

(1) † See *Taylor v. Plumer*, 3 M. & S. 562 ; ante, p. 87. (4)†

(g) Per Lord Mansfield, Cowp. 200. || If an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, notwithstanding the bank after notice had paid the money on the check of the agent. Rogers, J. delivering the opinion of the court said : " Rees was but an agent for a special purpose, and he acquires no property in the drafts or their proceeds as against his principal, and certainly he can acquire none through the medium of a fraud ; and why it should be necessary to use the name of a fraudulent agent, who has no claim or pretence of claim to the money, I cannot imagine. It is a suit by the owner to recover money in the hands of a third person who holds it, after notice, for his use. A merchant sends his clerk to deposit money in bank, and instead of depositing it in the name of his employer, he deposits it in his own name : would a payment to the clerk, after having notice of the fraud, protect the bank from the suit of the principal ? Would it be necessary to bring suit in the name of the clerk ? This will not be pretended ; for to whom does the money belong ? Surely not to the clerk, but to the principal ; and as soon as the bank are informed of the fraud, they become stakeholders, and must pay the money to the person entitled to it.—Again : A merchant sends his clerk with a check to draw money out of bank for the ordinary purposes of his business. The clerk draws the money and deposits it in his own name. Of this the bank in due time has notice. To whom are they bound to pay the money ? to the fraudulent clerk or the owner ? Can it be that by the fraudulent transfer of the funds to himself, he acquires such a property as that he only can receive it, and that it can only be received in his name ? It is true, that until the bank has notice, they may consider the agent as the owner of the funds ; but when they are informed the money belongs to the principal, they are as in justice they

payment of the money not being in the course of
[*339] the clerk's employment, it was "necessary to identify it, in order to prove that the master had any right to it.

The servant in this case is an admissible witness for the master, if released.(h)

should be, placed in a different situation. They are stakeholders for the owner, and must at their peril pay it to him; and to protect themselves they may require an indemnity." *Frazier v. The Erie Bank*, 8 Watts & Serg. 18. So, where a person obtains money from a bank, by an improper and fraudulent overdrawing of his account, and the money thus obtained is placed in the hands of a third person, who has notice of the fraud before he parts with the money, or pays any valuable consideration therefor, the latter cannot retain the money against the just claim of the bank. *Mechanics Bank v. Levy*, 3 Paige, 606; and see ante, 89, n. (6); *The Tradesmens Bank v. Merritt*, 1 Paige, 302; *Hutchinson v. Reed*, 1 Hoff. Ch. Rcp. 317, 337, et seq.||

(h) Per Lord Mansfield, Salk. 289; Bull. N. P. 290. Qu. if a release be necessary, Salk. 289. || The hands employed by the master of a boat are competent witnesses for the owner, in an action by him to recover damages for an injury to the boat, without being released: but in a suit against a canal company to recover damages for an injury to the plaintiff's boat, occasioned by the misconduct of one of the defendants' lock-keepers, it was held, that the master of the boat was not a witness for the plaintiff, without a release, where it is alleged that the injury arose from the master's mismanagement. In the same case was considered what was a sufficient release to qualify a witness. Kennedy, J., delivering the opinion of the court says, "As to Miller & Bayley, [the hands employed by the plaintiff to assist in navigating the boat, under the direction of Williams, the master,] we think that they were competent witnesses for the plaintiff, without being released by him, because they were under the control and direction of Williams, to whom the plaintiff had given the command of the boat, and bound to do as Williams directed them, notwithstanding that by doing so, they might occasion the injury complained of. In such case, Williams alone would be responsible to the plaintiff; and to him he would have to look for compensation. But from the relation in which Williams stood to the plaintiff, he was undoubtedly incompetent on the ground of interest, unless first released by the plaintiff; and so the plaintiff thought himself, for it appears that he gave to the witness, before taking his deposition, what he considered or was advised was a release. It however is objected to, because it was not executed by the plaintiff under his seal, as well as his hand, and appears to have been given without any consideration, or at least none is expressed in it. We consider the objection to the release fatal. Had the plaintiff af-

‡ It is almost unnecessary to add, that if the agent improperly dispose of a bill belonging to his principal, by endorsing it when over-due, the holder, who in that case takes it subject to all imperfections of title, cannot retain against the principal either the bill itself or one substituted for it, whilst in the hands of the same holder.(2)

And it has been already shown that not only must the notes, &c. have been received *bona fide* and for value, but that the party taking them must have exercised reasonable caution. So that if he took them without due inquiry, under circumstances which ought to have excited suspicion, he will be liable to make them good to the owner.(3)‡

5thly, Whether a master may bring an action for the recovery of his servant's earnings seems to be a point not altogether settled.(i)

‡ There would not however, it is apprehended, be much difficulty in deciding such a point when *it arose. The question would be, 1st, Was the [*340] transfer of service originally made with the master's assent. If not, it seems clear that the master might, by subsequently adopting the act, maintain an action for work and labor done by his servant. If yes, there is then the further question, whether the servant, in that particular employment, was to be considered as the servant of his original master or that of the person immediately employing him; and it is submitted that if the master were liable for

fixed his seal to it, the sealing and delivery by him to the witness would have been a sufficient consideration, in the eye of the law, to render it valid and binding: but setting his hand or name only to it, without any consideration being expressed on its face, or proved to have been given for his doing so, it must be regarded as having been given without consideration, and therefore inefficacious. This is according to what would seem to be the better and most approved rule on the subject." *Schuylkill Navigation Company v. Harris*, 5 Watts & Serg. 28.||

(2) ‡ *Lee v. Zagury*, 1 Moore, 556.‡ || S. C. 8 Taunt. 114; ante, p. 119, n. (t).||

(3) ‡ Ante, p. 238.‡

(i) Upon this subject the reader is referred to Mr. Hargrave's note, Co. Litt. 117, a.

wages to the servant, during the period of the substituted employment, the inference would arise that he still considered the servant as his own, and did not intend to waive the benefit of his earnings. But if by previous agreement he were released from a proportionate amount of wages, then the contrary conclusion would be the more reasonable. If payment have been made to the servant in ignorance that he was the servant of another, probably in that case the employer would be discharged.†(A)

SECTION 3.

Recovery of Goods wrongfully transferred by Agent.

When property is entrusted to an agent for any purpose as for sale, &c. a transfer by him, agreeable to that purpose, and according to the usual course of trade, [*341] or his express commission, conveys "a complete title to the holder. But a delivery for a different

(A) || When an apprentice is employed without the knowledge or consent of his master, the master is entitled to all his earnings, whether the person who employs him did or did not know that he was an apprentice; but in the case of a hired servant, the employer must have notice of his being the servant of another, to make him answerable. So, where an apprentice ran away from his master in New York, and entered on board of a ship, and signed articles by which he engaged to perform the whole voyage, and to forfeit his wages in case of desertion or embezzlement; and during the voyage he deserted, having been guilty of embezzlement; it was held, that the master was entitled to recover his whole earnings from the ship-owners, during the time he was on board, without any deduction for wages advanced to the apprentice, though neither the owners nor captain knew that he was an apprentice. *James v. Le Roy*, 6 Johns. Rep. 274. And see *Trongott v. Byers*, 5 Cow. 480, where it was held, that the owner of a slave who deserts his master, and works for another, need not give notice of his claim to entitle himself to an action for the slave's services, for which he is entitled to recover without deduction for necessary advances to the slave, such as clothing, medical attendance, &c.||

purpose, or in a manner not authorized by the commission, passes no property in the thing delivered, which may therefore be reclaimed by the owner.

A sale therefore upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer; and the thing sold may be recovered in an action of trover.(a)

Likewise a deposit by way of pledge or exchange(b) from a factor or broker, whose only authority is to sell, confers no right; therefore, notwithstanding an assignment of a bill of lading by a factor *as a pledge*, the vendor principal may stop the goods *in transitu*.(c) Or if the goods themselves have been deposited, the value may be recovered in an action of trover.(d) And this applies as well to securities not negotiable as to goods.(e)

In this action || trover || the holder of the goods cannot avail himself of any right which the agent, as between himself and his principal, might have to retain them. For this right is personal; and therefore it is not necessary, in order to support *the action, that the [*342] owner should tender to the holder the amount of what was due to the agent.(f)

And to assist the remedy afforded by this mode of proceeding, the holder may be compelled in a Court of Equity to give a description of the goods.(g)

As the taking of another's property, by the delivery of one who has no authority to deliver it, is in itself tortious, no demand and refusal is requisite to sustain the ac-

(a) Ante, p. 212, || p. 173, n. (w); *Peters v. Ballestier*, 3 Pick. 495.||

(b) 3 Atk. 44, ante, p. 213.

(c) Ante, p. 215. *Newsom v. Thornton*, 6 East, 17; 4 Burr. 2046.

(d) Ante, p. 214.

(e) Ante, p. 233.

(f) Ante, || p. 78, et. seq. || 7 East, 4; 5 T. R. 604; 2 East 523 but see an exception to this rule, ante, 217; †and see p. 230.†

(g) 3 Ves. 226.

tion of trover where the property has been pledged,^(h) or disposed of in any other unauthorized manner,⁽ⁱ⁾ as by an unwarranted sale, or by exchange. †But if the original disposition of the goods to a third person was within the scope of the factor's authority, a subsequent dealing, whereby the transaction is converted into a pledge, will not make the holder liable in trover without proof of a demand and refusal, the *taking* having been lawful and the *detention* only being unjustifiable.^{(1)†}

[*343]

*SECTION 4

What Acts of the Agent enure to the Benefit of Principal.

1. The acts of agents, properly authorized, enure to the benefit of the party in whose name they are done. They are in truth his acts. Therefore on an issue, the form of which was whether a certain sum had been paid by the grantee of an annuity, evidence that it was paid by his agent was held to support the affirmative.^(a) So the demand of a debt by a known clerk of a creditor is sufficient to make an act of bankruptcy by denial.^(b) And a *demand* by a known agent, or one who produces his authority, and

^(h) *McCombie v. Davies*, 6 East, 538.

⁽ⁱ⁾ *Anon.* 12 Mod. 514.

⁽¹⁾ †*Stiernhold v. Holden*, 4 B. & C. 5; and see *Dufresne v Hutchinson*, 3 Taunt. 117.

^(a) *Coare v. Giblett*, 4 East, 85. This point, it is necessary to observe, arose upon an issue joined upon the fact of payment, without reference to the annuity act, 17 G. III. c. 26. For it is not sufficient, under the requisitions of that act, sect. 3, to state in the memorial a payment of the consideration by the grantee, if it were in fact paid by his agent, 4 East, 101. *Aiken v. Mackreth*, 1 Bos. & Pull. N. R. 214.

^(b) Co. B. L. 79.

is empowered to receive the thing demanded, is sufficient to maintain an action of trover.(c)

2. But where a demand or notice, conveyed by an agent, is intended to affect a third person with damages for non-compliance therewith, it is necessary that the agent should be duly authorized. Thus on a plea of tender, and replication of a *subsequent demand and refusal, [*344] the evidence of the demand was, that the clerk to the attorney in the cause had gone by his master's direction to demand the money, which the defendant refused, asking him by what authority he came, to which the clerk answered that he was sent by his master. Lord Kenyon said, that on an issue of this sort turning on the demand,(d) it should appear that the person who made the demand was properly authorized to receive the money ; and though payment to the attorney would have been good, it was otherwise to a clerk who showed no authority but his master's orders to demand it. That the defendant, therefore, was not bound to pay the money to a person coming under these circumstances ; and his representing himself as clerk to the attorney, and that he had been sent by him for the purpose of demanding it, was not a sufficient authority to receive, and therefore warranted the defendant in refusing to pay the money. And upon an issue as to the same fact, Lord Ellenborough ruled, that a demand by the attorney's clerk was not sufficient to rebut the effect of a previous tender, holding that the demand ought to have been made by some one authorized to give a discharge. But a demand by the attorney himself would have done.(e) *Neither will a demand of goods by an [*345] unauthorized person support an action of trover.(f)

(c) *Bohtlingk v. Inglis*, 3 East, 381.

(d) *Coare v. Callaway*, 1 Esp. Cas. 115

(f) *Solomons v. Dawes*, 1 Esp. Cas. 83.

(e) *Coles v. Bell*, 1 Campb. 478. ¶“ Whenever a demand of payment is made, the person making the demand should have with him the evidence of the debt : for otherwise the debtor may well refuse to pay, on the ground

3. There are indeed some cases in which an act done without any previous authority may become beneficial to the person for whose use it was done, by his subsequent adoption of it. But this only holds where no immediate act is to be done upon it by a third person. Such are the instances of continual claim made, or an entry to avoid a fine by a person having no present authority; in which cases bringing an action upon these acts is considered such an adoption as supplies the want of authority.^(g) But if the act done be intended to raise a duty in a third person, so as to subject him to damages for the non-performance of that duty, an unauthorized proceeding cannot be brought to have that effect by a subsequent sanction: for in that case the party is entitled to such a notice as he can act

that he has the right to have his obligation or contract, or to see it cancelled, when he is called upon to discharge it. And this rule will especially apply to negotiable securities, which may legally be transferred to another, at the very time the original payee makes his demand of payment. This rule may admit of exceptions: as where the security may be lost; in which case a tender of sufficient indemnity would make the demand valid, without producing the security; and where, from the usual course of business of which the parties are consant, the security may be lodged in some bank, whose officers shall demand payment and give notice to the endorser, according to the custom of such banks; the security not being presented at the time of the demand, but the parties being presumed to know where it may be found." *Parker, J. Freeman v. Boynton*, 7 Mass. Rep. 486. To sustain a motion for an attachment for non-payment of costs, a certified copy of the rule directing the payment of costs should be personally served on the party liable to the payment, together with the taxed bill of costs, and a demand of payment made; and if the demand be made by any other person than the attorney entitled to receive them, he should exhibit to the party a written authority from the attorney to demand and receive the costs. 2 Dunl. Pract. 740.

Where a party assumes to sign for another, the authority to sign must appear. Lord Denman, C. J. "It is clear that a person's signing and saying that he does so for another, cannot make the signature the act of that party. The person signing may be a volunteer: and he, and not the person whose name is subscribed, may have deliberated upon the matter to which the name is added." *The Queen v. The Justices of Surrey*, 5 Ad. & Ell. N. S. 506-511.||

^(g) *Fitchett v. Adams*, Co. Lit. 258, a.; Str. 1108.

upon with certainty at the time it is given, and is not bound to submit himself to the hazard whether the principal will choose to ratify the act or not.^(h)

Where upon the insolvency of a vendee, a person without any authority from the vendor, stopped *the goods *in transitu*, it was doubted whether [*346] his subsequent approval made the stoppage *in transitu* good.⁽ⁱ⁾ † And it is certain, that unless the act was done adversely to the interests of the vendee, the subsequent adoption of it by the vendor cannot turn it into a stoppage *in transitu*. Thus in *Bartram v. Farebrother*, where the attorney of an insolvent vendee had, upon his suggestion and without instructions from the vendor, given notice to the wharfinger not to deliver goods; it was held, that the subsequent ratification of the act by the vendor did not make it a valid stoppage; although as the court [considered it a rescinding of an existing contract by consent of both parties, the ultimate decision was not affected by that circumstance.⁽²⁾†

Even where the demand is made by a person properly authorized, yet it seems that the party has a right to be satisfied of the authority before he acts upon the demand; and that a refusal upon that specific ground is justifiable. Thus in an action of trover, where the demand was made by the plaintiff's wife, it is said by Lord Kenyon, "If the demand be not made by the plaintiff himself who is the owner, but by another person on his account, and the de-

(h) *Right v. Cuthell*, 5 East, 498. Per Lord Ellenborough. And see the reasoning of Mr. Justice Lawrence in that case. (But see *Doe v. Chaplin*, 3 Taunt. 120.) † See ante, p. 190, n. (c), where the law on this subject is stated. ‡ In *Doe v. Goldwin*, 5 Ad. & Ell. N. S. 143, it was held, that a notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time of giving it. ||

(i) 6 East, 371, 380.

(2) † 4 Bingh. 579; *Danson and Lloyd*, 42; and see *Siffkin v. Wray*, 6 East, 371.

fendant refused to deliver the goods, *on the ground*
 [*347] *that he does not know to whom they belong*, and
 therefore keeps them till that is ascertained ; or
 that the person who applies is not properly empowered to
 receive them ; or until he be satisfied by what authority he
 applies, that shall not be deemed such a refusal as shall be
 evidence of a conversion.(k)

‡ This doctrine, however, must be received with some
 qualification, for supposing the person making the demand
 to be properly authorized and known to be so, a refusal to
 deliver, on the ground that the holder is ignorant of the
 title of the party on whose account the demand is made,
 will not protect him against an action of trover. The re-
 fusals is at his own peril, if the title be subsequently
 shown.(3)‡

And where a proper authority exists, and is notified to
 the person on whom the demand is made, as where a de-
 mand of a debt is made under a power of attorney, it is not
 necessary that it should be produced, unless required to be
 so.(l)

SECTION 5.

Effect of delivery to Agent to vest the Property in Prin- cipal.

The delivery of goods to an agent so far vests the
 [*348] property in the principal as to conclude the *ven-
 dor's right to stop them *in transitu*. It is not ne-

(k) *Solomons v. Dawes*, 1 Esp. Cas. 83.

(3) ‡ *Wilson v. Anderton*, 1 B. & Ad. 450.‡

(l) *Roe v. Davies*, 7 East, 364. ¶ The party of whom the demand is
 made, has no right to require that the original power of attorney should be
 deposited with him. *Wallis v. The President &c. of the Mechanics Co.*
 2 Hall, 501.¶

cessary, in order to determine the *transitus*, that the goods should come to the *corporal* touch of the vendee.(a) But in applying the rule here mentioned, it is necessary to discriminate precisely between those agents who are merely employed in assisting the *passage*, from those by whose possession the *passage* is at an end, and the goods require a fresh direction to put them in motion.(b)

As long as the goods are in the hands of any person for the mere purpose of facilitating the conveyance to some further appointed place of destination, the vendor's right remains.(c) In the case of *Stokes* and *La Riviere*, the facts were these: The plaintiffs, by order of Messrs. *Duhems* of *Lisle*, packed up the goods, and delivered them to the defendants in *London*, to be forwarded to *Lisle*. These goods were forwarded by the defendants to their correspondents, Messrs. *B. and O.* at *Ostend*, with directions to send them

(a) *Ellis v. Hunt*, 3 T. R. 464; § 2 Kent's Comm. 545. "The law is clearly settled, that the unpaid vendee has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own, before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at end.—This is a case of *actual* possession.—A case of *constructive* possession is, where the carrier enters expressly or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him. It appears to us to be very doubtful, whether an act of marking or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep the goods in the nature of an agent for custody; but it is unnecessary to determine this point, &c." Parke, B. *Whitehead v. Anderson*, 9 Mees. & Wels. 534.¶

(b) Post, § 350, et seq.¶

(c) The distinction here alluded to may be illustrated by the doctrine delivered in the case of *Fowler v. McTaggart*, 7 T. R. 442. Post, 354, n. (q)

to the order of Messrs. *Duhems*. On the receipt of the goods *B.* and *O.* wrote to *Duhems* an acknowledgment, and that they waited their directions. The plaintiffs, however, hearing of *Duhems*' *insolvency, countermanded the goods while in the hands of *B.* and *O.*; and the action was brought against the defendants, who had got possession of, and retained them in right of *Duhems*, contending, that upon the delivery of the goods to themselves, as the agents of *Duhems*, the plaintiff's right to stop them was determined.^(d) This cause was tried at *Guildhall*, before Lord Mansfield, who said, "The fact I take to be this: The *Duhems* bought goods of the plaintiff, which were ordered to be delivered to the defendants to be shipped to *Duhems*, who are since become insolvent, after the goods were sent to a factor at *Ostend*. No point is more clear than that, if goods be sold and the price not paid, the seller may stop them *in transitu*; I mean every sort of passage to the hands of the buyers. There have been a hundred cases of this sort. These goods are in the hands of the defendants to be conveyed; the owner, therefore, may get them back again."^(e)

Again, where goods had been sent by orders from the vendee to a packer, the packer was considered as a middleman between the vendor and vendee; and, therefore, the Court held that they might be stopped *in transitu*.^(f)

This case is very shortly reported; but it must be presumed *that the packer's business was preparatory to the goods being conveyed to the vendee.^(g)

Thus also, *G.*, a trader at *N.* in *Devonshire*, ordered goods in *London*, which were sent, consigned to *G.* via *Exeter*, and advice thereof given to *G.* Upon their arri-

(d) 3 East, 397, and 3 T. R. 466.

(e) 3 East, 398; 5 East, 185. † The same point was determined in the case of *Coates v. Railton*, 6 B. & C. 422.†

(f) *Hunt v. Ward*, 3 East, 467.

(g) This supposition is necessary to make the case accord with that of *Scott v. Pettit*, 3 Bos. & Pull. 469.

val at *Exeter*, which was as far as they could go by water, they were delivered to *C.* a wharfinger, who received them on *A.*'s account, and paid the freight and charges. It was held that, while in *C.*'s hands, the goods were still *in transitu*.^(h)

A delivery to a carrier specially appointed by the vendee, who again delivers the goods to a wharfinger usually employed by the vendee on his account, to be forwarded to the vendee, does not prevent the right of the vendor to stop them.⁽ⁱ⁾

2. In all these cases the principle constantly referred to is, that the goods were in some stage of conveyance to the purchaser, or his appointee. The following authorities will afford a clear line of distinction between the above and

^(h) *Mills v. Ball*, 2 Bos. & Pull. 457. (See also *Smith v. Goss*, 1 Camp. 282.)

⁽ⁱ⁾ *Hodgson v. Loy*, 7 T. R. 440; † and see *Bohtlingk v. Inglis*, 3 East, 380. ‡ *Buckley v. Furniss*, 15 Wend. 137; S. C. 17 Wend. 504; *Edwards v. Brewer*, 3 Mees. & Wels. 375; *Tucker v. Humphrey*, 4 Bing. 517. "The law appears to be well settled, that the right of stoppage *in transitu* exists so long as the goods remain in the hands of a middle-man on the way to the place of their destination, and that the right terminates, whenever the goods are or have been either actually or constructively delivered to the vendee; a delivery to the general agent of the vendee is of course tantamount to a delivery to himself. The time during which the right exists therefore, is during the whole period of the transit from the vendor to the purchaser, or the place of ultimate destination, as designated to the vendor by the buyer; and this transit continues so long as the goods remain in the possession of the middle-man, whether he be the carrier either by land or by water, or the keeper of a warehouse or place of deposit connected with the transmission and delivery of the goods." Walworth, Ch. *Covell v. Hitchcock*, 23 Wend. 613. If the buyer name the ship by which the goods are to be sent, it makes no difference as to stoppage *in transitu*. *Thompson v. Trail*, 2 Carr. & Payne, 334. Where goods were shipped at Malaga in Spain, on board of a ship belonging to the vendees, the master of which signed a bill of lading, by which they were to be delivered to his owners at Philadelphia; it was held that the delivery on board the vessel was a sufficient delivery to the vendees, and that the right of stoppage did not afterwards exist. *Bolin v. Hufnagle*, 1 Rawle, (Pa.) Rep. 9. This last decision may well be questioned. 2 Kent's Comm. 544, n. (a); post, 354, n. (q).||

those cases in which the delivery of goods to an agent bars the right of the vendor to retake them.

In an action of trover it appeared that the goods [*351] *in question were purchased of the plaintiff at *Manchester* by one *M.* (who was the general agent in *London* of the house of *Le Grand & Co.* of *Paris*) in the name of that house. By *M.*'s directions the goods were sent for him to the house of the defendant in *London*, who was a packer. Upon their arrival there, *M.* came to the defendant's house, and had some of the goods unpacked and sent away, and the remainder repacked. The house in *Paris* failing, the plaintiffs demanded the goods, which had been repacked, of the defendant, and tendered him his charges. *M.* had a general power either to send the goods to *Le Grand & Co.* at *Paris*, or to *Holland*, *Germany*, or such other market as he should think most beneficial. It was insisted for the plaintiffs, upon the authority of some of the cases cited above, (k) that the goods were still *in transitu*. But Lord Alvanley, with the concurrence of the court, said, "These goods were not sent to the defendant to be delivered by him to the house of *Le Grand & Co.* at *Paris*; but they were sent to *M.*, the agent of that house in *London*, and were there to await his disposal, he being invested with authority to send them to such market as he should think most advisable. None

of the cases cited therefore, apply to the present." (l) [*352] *This case has a near resemblance to that of *Stokes* against *La Riviere*, (m) in which the result was the reverse: and it will be remarked, that the difference of the two cases consists in this, that in the present the effect of the first destination given to the goods by the sellers was at an end by the delivery to the buyer's agent in *London*; and it was not intended necessarily that they

(k) *Hunt v. Ward*, 3 T. R. 467

(l) *Leeds v. Wright*, 3 Bos. & Pull. 320.

(m) *Ante*, 348; 3 East, 397, 8.

should ever come otherwise into the possession of the buyer than by being in that of the agent; but in the other, the goods were intended to be delivered to the buyers at *Lisle*, and the delivery to their agent in *London* was only in furtherance of that intention.

It has been observed(^A) that the delivery to a packer, preparatory to the conveyance to the buyer, has been held not to determine the *transitus*; but where the purchaser lived in *London*, and the goods were directed to him at an inn in *London*, where they arrived, and were taken from thence to his packer, he having no warehouse in *London*, it was determined that they could not be stopped by the vendor in the packer's hands.(ⁿ) For the *transitus* of goods is only not at an end by their reaching the packer, where they remain *with him for the purpose of [*353] being forwarded to some ulterior appointed place of destination.(^o)

The following case adopts and confirms the principle of the foregoing. This was also an action of trover; and the goods in question had been furnished by the defendant resident at *Manchester*, to the order of *B.*, a trader in *London*, whose usual course of dealing it was to send orders to the defendant for goods to be forwarded to *M. & Co.* at *Hull*, for the purpose of being shipped to the correspondents of *B.*, at *Hamburgh*, and by those correspondents sent to the persons for whom the goods were intended. When the goods arrived at *Hull*, *M. & Co.* received orders from Messrs. *B.*, when and to whom to ship the goods at *Hamburgh*. The order for the goods in question was in the ordinary way, viz., to be packed in bales marked *G. S.* for order, and *to be forwarded to Messrs. M., to be shipped for Hamburgh, as usual.* They were accordingly sent to

(^A) ¶ Ante, 349.¶

(ⁿ) *Scott v. Pettit*, 3 Bos. & Pull. 469; and *semb.* goods consigned to a vendee in *London* are, upon their arrival and landing at the usual wharf there, no longer in *transitu*. *Richardson v. Goss*, 3 Bos. & Pull. 119.

(^o) Per Lord Ellenborough, 5 East, 186.

Messrs. *M.* at *Hull*, marked and made up as directed, where they were stopped by the defendants, the vendors. One of the house of *M.*, the agents at *Hull*, described their business to be merely *expeditors*, agreeable to the directions of Messrs. *B.*—a stage and mere instrument [*354] between buyer and seller; that *they had no authority to sell the goods, and frequently shipped them without seeing them; that the bales were to remain at their warehouse for the orders of Messrs. *B.*, and they had no other authority than to forward them. The question upon these facts was, whether the vendors could stop the goods in the hands of the agents at *Hull*; and the court was of opinion that they could not; (*p*) assigning as a reason that the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination; and that without such orders they would continue stationary. (*q*)

(*p*) *Dixon v. Baldwin*, 5 East, 175. Diss. Mr. Justice Grose.

(*q*) Per Lord Ellenborough, 5 East, 186. The doctrine by which the foregoing cases are governed may be further illustrated by the decisions in the cases of *Fowler v. M'Taggart*, 7 T. R. 442; 1 East, 522; 3 East, 396; and of *Bohtlingk v. Inglis*, 3 East, 381. From which it may be collected, that if goods be put on board a ship hired by the vendee, not for the purpose of being carried from the vendors to the vendee, (per Lawrence, J. 3 East, 396,) but to be sent under the vendee's direction upon a mercantile adventure to some other place, the *transitus* is at an end; but that it is not so by delivery on board a ship sent by the vendee to bring away the goods from the place where they are bought, to the vendee; notwithstanding the ship is chartered by him, and the goods shipped at his risk. (See also *Ogle v. Atkinson*, 1 Marsh. 323.) || In accordance with the above doctrine, and pursuing the same distinction, Parsons, C. J., observes; "The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them *bona fide*, and endorsed over the bills of lading to the purchaser. And in our opinion, the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage be, or be not provided for in the bills of lading. When such actual possession after the termination of the voyage is so provided for, then the right of stopping *in transitu* remains after the ship-

‡ And the same principles were recognized in
*the more recent case of *Rowe v. Pickford*.(1)‡ [*355]
[That was an action of trover ; and it appeared that
the consignee was in the habit of purchasing *Manchester*
goods, through the medium of an agent at that place, and
of exporting them to the *Continent*, on or shortly after
their arrival in *London* ; that he had no warehouse of his
own in *London*, and that the goods consigned to him re-
mained in a certain waggon office until they were remov-
ed by the consignee's agent, for the purpose of being ship-
ped ; that the consignee always received notice from the
proprietors of the waggon office of the arrival at their ware-
house in *London* of any goods addressed to him ; and that
such goods remained there until an opportunity for ship-
ping them occurred, when an order to remove them, to-

ment. Thus if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment : but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed : because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment. The same rule must govern if the consignee be the ship owner. If the goods are delivered on board his ship to be carried to him, an actual possession by him after the delivery is provided for by the terms of the shipment ; but if the goods are put on board his ship to be transported to a foreign market, he has, on the shipment, all the possession contemplated in the bills of lading. In the former case the transit continues until the termination of the voyage ; but in the latter case the transit ends on the shipment. We think also that the same distinction must exist in the case of a general ship. If a ship sail from this country to Great Britain, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market, as the mercantile adventures of different shippers—if goods are so shipped by the several consignors, there is no transit to the consignees after the shipment ; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk, for a future actual possession by them is provided for in the bills of lading." *Stubbs v. Lund*, 7 Mass. Rep. 457, 458. ¶

(1) [1 Moore. 526.] ¶S. C. 8 Taunt. 53. ¶

gether with the note left with him containing information of their arrival, was given by the consignee to his shipping agents. On these facts the question that arose was, whether the consignor's right of stopping *in transitu* was determined. And the court, observing that the question must be governed by decided cases, held, that as the consignee had no warehouse in *London*, but that the goods always remained at the waggon-office, until they were removed by the consignee's agent for the purpose of [*356] being shipped, the *transitus* must be considered *as at an end, and consequently that the right of stoppage *in transitu* was destroyed.(2)]

There is, indeed, one case which seems inconsistent with the distinction preserved in those already referred to, viz. that of *Hunter v. Beale*, which was an action of trover for a bale of cloth, sent by S. & Co. of Wakefield, to the defendant, an inn-keeper, directed to the vendee, to whom the defendant's book-keeper gave notice that a bale was arrived for them. The vendee thereupon gave orders to the defendant to send the bale down to the Galley Quay, in order to ship it on board the *Union*, to be carried to Boston. The defendant sent the bale to the quay; but, arriving too late to be shipped, it was sent back to him. A few days afterwards, the vendee's clerk went to the defendant's warehouse, when the defendant inquired what he was to do with the bale, and was ordered to keep it in his custody till another ship sailed, which would be in a few days. Before that happened, the vendee becoming insolvent, it was stopped by the vendors. This action was brought by the assignees of the vendee; and it was the opinion of Lord Mansfield, that though the goods might be legally deliver-

(2) † See also *Foster v. Frampton*, 6 B. & C. 107; and on the subject of stoppage *in transitu* in general, see Law Mag. vol. 5, art. 7.† ¶ "If a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and disposes of them there, the *transitus* will be at an end when the goods arrive at such warehouse." Park, J. *Tucker v. Humphrey*, 4 Bing. 516. ¶

ed to the vendee for many purposes, yet for this purpose there must *be an actual possession by [*357] the bankrupt, or (as his Lordship expresses it) they must have come to his corporal touch.(r) But it is to be observed of this case, that the position contained in the latter part of it, as to the necessity of actual possession, has been repeatedly contradicted, particularly by the authority of the case in the course of which it was cited. And further, that on a recent occasion, where this question was much discussed, the present || then|| Lord Chief Justice of the King's Bench(3) expressed the following opinion of the case: "In *Hunter v. Beale*, I cannot but consider the transit as having been completely at an end in the direct course of the goods to the vendee, i. e. when they had arrived at the inn-keeper's, and were afterwards under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him to Boston, being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination." And the same observation is made upon it by Mr. J. Le Blanc.(s)

*SECTION 6.

[*358]

Where the Agent is a Witness for the Principal.

1. In actions brought to enforce contracts made by means of an agent, it is clear that the agent himself is a good wit-

(r) Cited in argument in *Ellis v. Hunt*, 3 T. R. 464. The case is nowhere reported.

(3) † Lord Ellenborough.†

(s) *Dixon v. Baldwin*, 5 East, 184. || And see *Dodson v. Wentworth*, 4 Mann. & Gr. 1080; *Jones v. Jones*, 8 Mees. & Wels. 431.||

ness for his employer. This has been frequently ruled.(a) And in an action for not receiving goods contracted for, the only witness for the plaintiff was the factor who made the contract, and who was to have 1s. per pound on all that he sold. A verdict was given for the plaintiff, reserving the question of the witness's competency for the opinion of the Court of Common Pleas; and that court unanimously determined that the factor was a good witness, considering him as concerned both for the vendor and vendee, and capable of being a witness for either. And a case in B. R. of *Scholey v. Gambier*, Easter, 7 Geo. I., wherein it was held that a Blackwall Hall factor may be a witness, notwithstanding his commission, was mentioned by the Chief Justice.(b) A broker employed to sell goods, who is to have for himself whatever money he can procure beyond a stated sum, is nevertheless a competent witness to [*359] prove the contract *between the seller and buyer.(c) This exception to the general rule, which excludes witnesses on account of interest, arises from necessity;(A)

(a) *Mason v. Hogsden*, 11 Mod. 226, per Holt, C. J.; 1 Atk. 248, per Lord Hardwicke.

(b) *Dixon v. Cooper*, Wils. 40. || A factor who has made advances for his principal, although he has a general lien on the goods and the proceeds of the goods of his principal in his hands, as a security for his advances, is nevertheless a competent witness for his principal, unless he has a specific claim upon the subject matter in controversy. *Baldwin v. Mildeberger*, 2 Hall, 176. A broker who lends money, and takes a check for his principal, including his commissions in the check, is a competent witness for his principal in an action against the drawer of the check. *Mauran v. Lamb*, 7 Cow. 174.||

(c) *Benjamin v. Porteus*, 2 H. Bl. 591. || A person employed as an agent in the conducting of a particular business, at a fixed salary, who by the terms of the agreement with his employers was to receive in addition thereto, one-third of the profits of the concern, but not to be liable for any losses, was held not to be a partner, and therefore a competent witness in an action brought by his employers. *Vanderburgh v. Hull*, 20 Wend. 70. A teller in a bank is a competent witness for the bank, although he has given a bond with sureties for the correct discharge of his duties. *United States Bank v. Stearns*, 15 Wend. 314.||

(A) || *United States Bank v. Stearns*, 15 Wend. 316; *Fisher v. Willard*,

the nature of the transactions in which agents are engaged being such, that the contracts they make for others could not be proved without them. And it is not confined to factors or brokers, strictly so called, but every man who makes a contract for another, comes in some sort within the description.(d) (1)

2. It is, from the like principle of necessity,(e) the constant practice to admit servants and agents to prove the payment of money or delivery of goods on behalf of their principals, although it be in their own discharge. If money have been overpaid, therefore, by a servant he is a competent witness in an action to recover it back.(f) Money embezzled by a servant from his employer, and paid by him in illegal lottery-insurances, was *re- [*360]

13 Mass. Rep. 381; *Taylor v. United States*, 3 Howard, 206; *Noble v. Paddock*, 19 Wend. 457; *Dudley v. Bolles*, 24 Wend. 465, 471; ante, p. 319, n. (c), p. 320, n. (d).||

(d) *Id. ib.* per Eyre, C. J. Auctioneers are competent witnesses to prove the sale. *Buckmaster v. Harrop*, 4 Ves. 474.

(1) [Where a person has entered into a contract for the purchase of goods in his own name, he is not a competent witness in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant. *M'Brain v. Fortune*, 3 Campb. 317.] † The question in the cause being whether he was agent or not.‡ || And see *Sage v. Sherman*, 25 Wend. 426, 430. But it was held that an agent contracting to buy goods for his principal is a competent witness for the principal in an action against the vendor for the non-delivery of the goods though he did not disclose his agency at the time. Savage, C. J. "To the competency of the witness there is no objection except his interest; and the question I apprehend is, not whether he might be interested in the contract when made; but has he an interest in the event of the suit? That he could have no possible interest I think is apparent. Those whom he represented, and on whose behalf his interest if any arose, affirmed the contract. If they recover, the witness makes nothing; if they fail, he loses nothing. Had the parties been reversed, perhaps it would have been different. Then indeed it might have been said as in *M'Brain v. Fortune*, that if his principals were not bound the agent would be. But that is an objection which cannot exist in the present suit." *Sewall v. Fitch*, 8 Cow. 215.||

(e) *Theobald v. Tregott*, 11 Mod. 262, per Holt, C. J.

(f) *Martin v. Horrell*, Str. 647; see also *Barker v. Macrae*, 3 Campb. 144, S. P.

covered from the office-keeper upon the evidence of the servant, who in that case had a *release*.(g) But in an action to recover goods against one who had received them by the tortious delivery of the servant, the latter was admitted to prove the fact, though it is not stated that he had a release.(h) And a servant who had embezzled money was admitted by Lord C. J. Holt in an action of trover to recover it from the person to whom it had been wrongfully transferred, though it does not appear that any release was given.(i)(2)

(g) *Clark v. Shee*, Cowp. 198.

(h) Bull. N. P. 290.

(i) *Anon.* 1 Salk. 289, and Bull. N. P. 290. "In trover against a pawnbroker, the servant embezzling his master's goods will be admitted to prove the fact."

(2) † There seems to be some reason for doubting whether, under such circumstances, a servant would be a competent witness without a release. The rule of *necessity* does not apply, because that refers to the contracts of servants and agents made in the regular course of their employ. Here the acts done were not in the performance of their duty as servants. In *Corking v. Jarrard*, 1 Campb. 37, Lord Ellenborough refused to receive the testimony of a servant so situated without a release, and the release, though given, not being producible in court, the plaintiff was nonsuited.‡ ¶ As to the competency of a servant as a witness for his master in a case of trespass or other tort; see further, *Noble v. Paddock*, 19 Wend. 456; *Barnes v. Cole*, 21 Wend. 188; *Dudley v. Bolles*, 24 Wend. 465.¶

CHAPTER V.

THE RIGHTS OF AGENTS AGAINST THIRD PERSONS.

SECTION 1.

THE rights which belong to agents are referable either to their representative, or individual character, according as the object is the advantage of the principal, or their own indemnity.

With respect to the *first*, it is clearly admitted, that where a contract is made by a factor, an action may be brought upon it in his own name.^(a) And it is the same

(a) 1 Atk. 248 ; Bull. N. P. 130. ¶ It would have been better if our author had in the first instance stated the general rule, and not have left it to be inferred that what is an exception, might be the rule itself. The general rule—the case of a factor being to some extent an exception—is, that a mere agent, who has no beneficial interest in a contract which he has made on behalf of his principal, cannot support an action thereon. 1 Liv. Pr. & Ag. 215 ; *Taintor v. Prendergast*, 3 Hill, 72 ; *Beebee v. Robert*, 12 Wend. 416 ; *Gilmore v. Pope*, 5 Mass. Rep. 491 ; *The Taunton and South Boston Turnpike Corporation v. Whiting*, 10 Mass. Rep. 336 ; *Thatcher v. Winslow*, *infra* ; Russ. Fact. & Brok. 240, 241. Therefore, where the defendant had agreed in writing to pay the rent of certain tolls which he had hired, to the treasurer of certain commissioners, it was decided, that an action for the rent could not be maintained in the name of the treasurer, the right to the tolls being vested in the commissioners, and the contract being in effect with them. *Piggott v. Thompson*, 3 Bos. & Pull. 147. So where A. having a general power of attorney to collect debts, &c., in the name and for the use of B. delivered a contract to an attorney to collect, who gave him a receipt for it, generally, as for collection, it was held, that A. could not maintain an action in his own name against the attorney for me-

thing whether the contract be made by the factor solely

ney collected by him on the contract so put into his hands. *Gunn v. Cantine*, 10 Johns. Rep. 387. A person who is a mere agent to sue for and collect money under a power of attorney, cannot be a party to a bill for an account in his own name, nor be joined as a co-plaintiff with his principal. *Oakey v. Bend*, 3 Edw. Ch. Rep. 482.

But where there is an express promise in writing to an agent, and his acts are subsequently ratified by his principal, the action may be in the name of the agent. "To hold otherwise," says Bronson, J. "would be to declare the contract nugatory, except where it was in the form of negotiable paper which could be transferred to the principal so as to enable him to sue in his own name. *Gunn v. Cantine*, on which the defendant relies, was upon an *implied* promise; and it was admitted in that case that the attorney might have sued in his own name, if there had been an express promise to pay the money to him." *Harp v. Osgood*, 2 Hill, 216. So, the payee of a note, although received by him as agent for another, may sue upon it in his own name. *Buffum v. Chadwick*, 8 Mass. Rep. 103. So, where a bill of exchange is endorsed to "S. S. F. Cashier," he may maintain an action upon the bill in his own name, notwithstanding he may be obliged to account to the bank of which he is cashier. *Fairfield v. Adams*, 16 Pick. 381. The general rule is well stated, by Bayley, J. in *Sargent v. Morris*, 3 Barn. & Ald. 277. "Now, I take the rule to be this; if an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say, that he is merely an agent, unless you can also show, that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made. In policies of insurance, it is a common practice to bring your action, either in the name of the agent or principal." And see *Garrett v. Handley*, 4 Barn. & Cress. 664.

Nor is the right of the agent to sue in his own name confined to an express contract whether written or verbal. Thus, one holding a bill of exchange or promissory note endorsed in blank, on a check or note payable to bearer, as a mere agent, may yet sue on it in his own name, and it does not lie with the opposite party to object the plaintiff's want of interest. *Mauran v. Lamb*, 7 Cowen, 174; *Little v. O'Brien*, 9 Mass. Rep. 423; *Brigham v. Marean*, 7 Pick. 40; *Adams v. Oakes*, 6 Carr. & Payne, 70. But see *Sherman v. Roys*, 14 Pick. 172; and in *Thatcher v. Winslow*, 5 Mason 58; Mr. Justice Story, said: "Unless the plaintiff is a real holder of the note, and has some interest in it, he cannot maintain an action as endorsee against the defendant. Here the proof is, that the Merchants Bank is the real holder, and the plaintiff is merely an agent for the bank.

upon his own credit, as is generally the case with factors

I take it not to be competent for a mere agent to maintain an action on a negotiable note in his hands, although it be with the consent of his principal. He must be the owner of the note, or have some substantial interest therein. *Prima facie* indeed, the possession of such a note is evidence of the party's being a holder for valuable consideration ; but if it is admitted or proved *aliunde*, that he is but a mere agent, and holds the note as such, he is not competent to recover a judgment upon it in his own name." The learned judge, in his Commentaries, (Agency, § 394, n. 3,) may be deemed to have more than doubted his own judicial decision.

Where A. and B. assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same, under which the plaintiff submitted to arbitration the matters in difference subsisting between his principals and the defendants ; and the plaintiff and defendants mutually promised to perform the award ; and the arbitrator awarded a sum of money to be paid by the defendants to the plaintiff as such attorney, and the action was brought in his name for the recovery of that sum ; it was held, that the action was well brought in the name of the plaintiff. *Banfil v. Leigh*, 8 Term Rep. 571. See further, *Bawden v. Howell*, 3 Mann. & Gr. 638 ; *Harper v. Williams*, 4 Ad. & Ell. N. S. 219 ; *Van Staphorst v. Pearce*, 4 Mass. Rep. 258 ; *Fisher v. Ellis*, 3 Pick. 322.

As to the right of a *factor* to maintain an action in his own name, the doctrine is stated by Mr. Russell, as follows : " It is now well settled, that where a factor although known to be such, sells goods in his own name on behalf of his principal, he may bring an action for the value thereof ; and it has been held further, that even where by the sale-note the contract appears to have been made by the factor for his principal, yet if the factor declare thereon as on a contract made with himself, this will be no variance, [Infra, n. (f)] But still it would appear, that if the contract, on the face of it, purported it to be made by the factor as the agent of a third person he could not sue thereon as principal without giving notice to the other contracting party that he was the person really interested.—As the factor although known to be acting as such, has still the right to sue third parties on contracts made with them in that capacity ; so it follows *a fortiori*, that he possesses this right wherever he is the only known and ostensible principal, and consequently in contemplation of law, the real contracting party." Russ. Fact. & Brok. 241, 244, and authorities there cited. And see 1 Liv. Pr. & Ag. 217 ; *Toland v. Murray*, 18 Johns. Rep. 24 ; *Murray v. Toland*, 3 Johns. Ch. Rep. 573 ; *DeForest v. The Fulton Fire Ins. Co.* 1 Hall, 132 ; *Girard v. Taggart*, 5 Serg. & Rawle, 27. Bayley, J. in *Sargent v. Morris*, 3 Barn. & Ald. 277.

The renunciation of the agent's contract by the principal does not neces-

abroad, or as the known representative of another ;(b) and it is indifferent whether he act under a *del credere* com-

sarily preclude him from maintaining an action ; but he will still be entitled to sue the party with whom he has contracted, for any damages which he may have sustained by reason of a breach of contract by the latter. Thus : the plaintiffs being factors, and authorized by one H. to buy for him a quantity of oil, employed B. an oil broker, to make such purchase for them. The defendant afterwards agreed with B. to sell the oil to the plaintiffs ; and bought-and-sold notes signed by B. were thereupon sent by him to the plaintiffs and defendant respectively, in which notes the goods were stated to have been " Bought for Messrs. Short, Brown & Bowyer, (the plaintiffs,) of Mr. W. F. Sparkman," (the defendant,) on certain terms therein specified. The plaintiffs sent a corresponding bought-note to H. their principal ; and they afterwards, under a general authority from him, sold the goods for his account, through another broker, to B. & Co. The bought-and-sold notes in this latter transaction, mentioned the plaintiffs and B. & Co. as the buying and selling parties. On this sale being communicated to H. he returned the sold-notes which had been sent to him, declaring that he would have nothing to do with the oil either as purchaser or seller ; and to this the plaintiffs assented. The defendant afterwards refused to deliver the oil in pursuance of his agreement ; and the plaintiffs, being unable to fulfil their engagement with B. & Co. were obliged to pay them a sum of money in satisfaction, the market having risen since the time of making the last mentioned contract. The plaintiffs thereupon brought their action against the defendant for not delivering the goods, and the court held, that they were entitled to recover, notwithstanding the renunciation of the contract by H. and the acquiescence of the plaintiffs therein ; because on the face of the contract it appeared that the plaintiffs had purchased as principals. *Short v. Sparkman*, 2 Barn. & Ad. 962. Russ. Fact. & Brok. 243, 244.

If, however, nothing more appears than the mere fact, that in making the contract in question the factor acted as the ostensible principal, this will give him only a qualified right to sue on such contract, and the principal will still have the power of superseding the factor's right by suing in his own name, or by taking any other proceedings whereby it becomes manifest that he intends to consider the other contracting party as his debtor. But still it must be borne in mind, that the rights of both the principal and of third parties, with reference to the present question, are subject to certain limitations in favor of the factor, which will be hereafter alluded to. Russ. Fact. & Brok. 245, 246 ; *infra*, n. (1) ; *post*, 364, *et seq* ||

(b) Bull. N. P. 130.

mission or not.(c) For it is a right which is incident to his employment.(1) And it is equally *true [*362] of every other agent who has a special property in, and not the bare custody of that which is the subject of the contract.(d) Thus an auctioneer may maintain an action in his own name for goods sold and delivered, though the sale be on the premises of the owner of the goods, and known to be his property.(e) † But if he suffer the purchaser to pay the principal without giving him notice of his own claim, he cannot afterwards sue for the price.(2)†

It is usual for actions upon *policies of insurance* to be brought in the name of the agent or broker instead of that of the principal. This is founded upon the promise being made to the agent,(A) and does not depend upon his hav-

(c) 3 Bos. & Pull. 491, 495.

(1) [Before the intervention of the principal the debt is considered as being legally due to the factor, and consequently he is a good petitioning creditor under a commission of bankruptcy issued against the purchaser; but he ceases to be so when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt *directly* from the purchaser. *Sadler v. Leigh*, 4 Camp. 195.]

(d) 2 Esp. N. P. C. 493. || *Shields v. Davis*, 6 Taunt. 65; *DeForest v. The Fulton Fire Ins. Co.* 1 Hall, 84||

(e) *Williams v. Millington*, 1 H. Bl. 81. || Ante 279, n. (4); *Hulse v. Young*, 16 Johns. Rep. 1.||

(2) † *Coppin v. Walker*, 7 Taunt. 237.†

(A) || A broker effecting an insurance can only sue upon the policy in case of loss, where he is the person recognized by the instrument as the party with whom the contract of insurance is made; therefore, if the broker's name no where appears on the writing, his mere intermediacy cannot invest him with a right of action. 1 Liv. Pr. & Ag. 225; *Bridge v. The Niagara Ins. Co. of New York*, 1 Hall, 247. Such appears to be the understanding of Mr. Russell, (Fact. & Brok. 250, 251,) who observes: "in the ordinary form, a policy of insurance on ships and goods, runs thus 'A. B. (the broker) as well in his own name, as for and in the name and names of all and every other person and persons to whom the same doth, may or shall appertain in part or in all doth make assurance and cause himself and them and every of them to be insured;' and in accordance with this form of policy, the practice has now become usual, to allow the insurance broker to sue thereon in his own name, whether in the particular

ing a *del credere* commission.(f) † And where a policy under seal is effected by an agent, the action can only be brought in the name of the agent.‡(B)

case he has acted under a commission *del credere* or not ; nor as it seems will he be debarred from maintaining this action, even although it be averred in the declaration that he was interested in the policy jointly with another person ; nor although it be made to appear, that at the time the policy was effected he had no authority from his principal to effect the same, provided the latter have ratified his act before action brought. But still the broker does not possess an absolute right to sue on the policy,—inasmuch as his right in this respect is liable to be superseded by the principal bringing an action in his own name, unless the policy be under seal.” Bayley, J. in *Sargent v. Morris*, 3 Barn. & Ald. 277 ; ante, 361, n. (a). Bayley, J. in *Garrett v. Handley*, 4 Barn. & Cress. 664.

Where a part owner of a vessel or its outfits effects insurance thereon in his own name only, and nothing in the policy shows that the interest of any other person is secured thereby, an action on the policy cannot be maintained in the names of all the owners, upon parol evidence that such part owner was their agent for procuring insurance, and that his agency and their ownership were known to the underwriters, and that the underwriters agreed to insure for them all, and that it was the intention of all the parties in making the policy to cover the interest of all the owners. *Finney v. The Bedford Commercial Ins. Co.* 8 Metc. 348.||

(f) If a contract be stated in the declaration to be with the agent, and it appears by the sale-note to be with him for his principal, the variance is not material. 2 Esp. Cas. 493 ; Bull. N. P. 130.

(B) ¶ This is a necessary deduction from a technical rule of the common law :—In a simple contract, a promise made for the benefit of a third person is valid, and may be enforced by the promisee by action, if he has an interest in the subject matter of the promise ; but where the contract is under seal and *inter partes*, no one but a party to the instrument can maintain an action for the breach of it ; thus, where a contract was entered into between A. and B. by which A. agreed to sell and that his principal should convey certain lands, and B. agreed to purchase and pay the purchase money to C. a third person, it was held that an action for the breach of the covenant did not lie by C. against B. *Spencer v. Field*, 10 Wend. 88. A trustee suing as a plaintiff in a court of law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the *cestui que trust* who uses his name : And therefore, where a broker in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that

If money have been mispaid by an agent under circumstances which give a right to recover it back, the agent may bring the action in his own name, as well as the principal.(g)

*The possession which a factor, or other agent, [*363] has of his principal's property entitles him to bring actions of trespass or trover,(h) for injuries affecting the possession.(3) And it has been said, that a factor to

although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants, and therefore an answer to the action. *Gibson v. Winter*, 5 Barn. & Ad. 96.||

(g) Per Lord Mansfield, Cowp. 805. † It should seem, however, that where a person has made a contract professedly as agent for another, but in reality for himself, he cannot, upon the rescinding of that contract, sue in his own name for money paid under it without giving previous notice to the party to be charged that he was the person really interested. *Bickerton v. Burrell*, 5 M. & S. 363.‡ || Where the plaintiff, an attorney, in order to effect a certain object for his client, paid the defendant under protest a larger sum than was due, it was held, that an action to recover back the overplus was rightly brought by the plaintiff, although he merely acted as attorney. *Smith v. Sleep*, 12 Mees. & Wels. 584. An agent employed to make an illegal bet may maintain an action in his own name, to recover back the deposit from the stakeholder. *Haywood v. Sheldon*, 13 Johns. Rep. 88. *McKeon v. Caherty*, 3 Wend. 494.||

(h) 1 H. Bl. 81. || *Shields v. Davis*, 6 Taunt. 65. *Burton v. Hughs*, 2 Bing. 173. *De Forest v. The Fulton Fire Insurance Company*, 1 Hall, 110, 132. *Holbrook v. Wight*, 24 Wend. 169. The last cited case was an action of replevin.||

(3) [The right of the agent, however, to recover, must necessarily depend upon the title of the principal to the property in dispute; and, therefore, if such a degree of fraud can be brought home to the latter as to affect his title, the agent is equally affected by it. Thus, where a bank-note for 500*l.* had been fraudulently obtained by some person unknown, and on its being presented for payment some time afterwards by an agent of a foreign principal, information was given of the fraud, and the principal was desired to inform the bank how he came by it, but the only account he would give of it was, that he had received it in payment of goods from a man dressed in a particular way, of whom he knew nothing; and it was further proved that bank notes of so large a value were not usually circulated in that foreign country; this was held to be sufficient evidence to be left to a jury, of the principal's privity to the original fraud, in an action of trover,

whom goods have been consigned, and who has never received them, may maintain trover.⁽ⁱ⁾ A doubt [*364] has been expressed, *whether a mere agent, to whom a bill of lading was endorsed, without consideration, by the consignor, to enable him to receive the goods, can maintain trover before the receipt of them.^(k) But it seems at present to be settled that he may, provided the consignment be not countermanded.^{(l)(4)}

brought by his agent to recover it from the bank, who had detained it under the authority of the original owner, to whom it properly belonged. And the question was not altered by the agent, who received it on account, having, after notice, made payments for his principal, which turned the balance in favor of the agent. *Solomons v. The Bank of England*, 13 East, 135, n.] † And see ante, p. 238.‡ ¶ A Bank of England note, which had been feloniously stolen in England in February, 1826, was remitted in May, 1827, by a foreign merchant to his correspondent in England, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the bank refused to pay on the ground that the note had been stolen. At the time when the correspondent had been informed of this, he had not made the foreign merchant any advance on the credit of the note: It was held, first, that in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could therefore recover upon his title only: And secondly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to show that the foreign merchant had given full value for it. *De La Chaumette v. The Bank of England*, 9 Barn. & Cress. 208.¶

(i) 1 Bos. & Pull. 47, † per Eyre, C. J., *obiter*.‡

(k) See *Coxe v. Harden*, 4 East, 211.

(l) Per Lord Ellenborough, Sitt. after Tr. T. 1810, Guildhall.

(4) [But see *Waring v. Cox*, 1 Campb. 369, *semb. contra.*] † The question seems to be, whether the agent, as consignee, has a personal interest in the goods, because to maintain trover, there must be a right of property of some kind, as well as a right of possession.‡ [In the case of *Joseph v. Knox*, 3 Campb. 320, it was held, that a person who ships goods in an English port, as the agent of the owner resident abroad, and pays the freight for them, may maintain an action in his own name, for not delivering them according to the bill of lading.] ¶ See *Anderson v. Clark*, 2 Bing. 20. “Although an opinion was formerly entertained to the effect that in all cases in which a person had merely a special property in goods, it was necessary, in order to his maintaining trover therefor, that he should once have had the actual possession thereof, yet the law seems now to be

otherwise; it being well settled by a number of recent decisions, that where goods have been consigned to a factor, under circumstances which show that it was the intention of the consignor to vest the property therein in the factor from the time of shipment, the latter may maintain trover against any one who wrongfully withholds the possession of such goods from him, even although he has never actually received them.—And it appears, that if it be manifest that the intention of the consignor was to vest the property in the goods in the consignee from the time of the shipment, it will be wholly immaterial whether the instrument by which this intention is proved be a bill of lading or not,—as it may equally be proved by means of a carrier's or wharfinger's receipt, or by correspondence alone." *Russ. Fact. & Brok.* 253, 254, and cases there cited.

"But," proceeds the writer from whom the foregoing passage is borrowed, pp. 254, 255, "if there be no evidence of such an intention on the part of the consignor, then the factor will not be entitled to maintain trover in order to obtain possession of the goods. Thus, if the principal when he consigns goods to his factor for sale be merely in a course of drawing on the factor, without there having been any acceptance of bills by the latter on account of the particular cargo, this circumstance, although it might give the factor a right to detain the goods when they came to his hands, will not entitle him to anticipate the possession, by bringing trover for them against the agent of the unpaid vendor, to whom they have meanwhile been delivered. (*Patten v. Thompson*, 5 Maule & Selw. 350.) So, although the factor may have accepted bills expressly on account of a particular consignment of goods, yet, if at the time the carrier signs the receipt for such goods, there have been no goods of the kind mentioned, delivered to him, or otherwise specifically appropriated to the factor, and the consignor afterwards alters the destination of the goods, the factor will not be entitled to maintain trover for them. (*Bryans v. Nix*, 4 Mees. & Wels. 775. *Evans v. Nichol*, 4 Scott, N. R. 43.) And in like manner, if the principal draws bills on his factor in anticipation of a particular cargo, and before the cargo is loaded, the latter accept such bills, but the principal, instead of sending the bill of lading to him, sends it to a third party with instructions to sell the cargo for his (the principal's) account, possession of the bill of lading afterwards acquired by the factor as the agent of such third party, will not entitle him to sue the latter in trover, in order to obtain possession of the cargo. (*Bruce v. Wait*, 3 Mees. & Wels. 15.) So it appears, that the endorsement of a bill of lading of goods by the principal to his factor without consideration, and merely for the purpose of enabling the factor to take possession of the goods, in order to secure to the principal the amount of a bill drawn by him on a third party to whom the goods have been consigned, will not give the factor a right to bring an action in his own name; (per Lord Ellenborough, *Coze v. Harden*, 4 East, 211-217, *supra* n. k;) nor will such an endorsement of a bill of lading to a factor, in order to authorize him to stop the goods *in transitu* on account of his principal, entitle him to maintain trover for them in his own name,

SECTION 2.

What Remedies an Agent has for his own Indemnity.

A factor may also have a right to enforce the payment of money to himself, in opposition to the claim of the principal. When a factor has a lien upon goods intrusted to him for sale, and which he has sold pursuant to that trust, the lien attaches upon the price,^(A) and the factor has a right to receive it for his own indemnity. This doctrine is laid down by Lord Mansfield, in a case *in which the right of the debtor to be discharged by paying the factor was discussed; and it is there declared, that in an action brought by the factor, to compel the payment of the price of goods sold by him, it would be no defence for the buyer, that as between him and the principal, he, the buyer, ought to have the money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him.^(a) And in an action brought by a broker, for the price of timber sold for his principal, upon which the broker had a lien for sums advanced, Eyre, C. J., would not allow the defendant to set off a debt due to him from the principal.^(b) This right equally exists where the factor has a lien upon the goods, though he be

unless it appear that he actually demanded the goods before the right of stoppage *in transitu* was at an end; (*Waring v. Cox*, 1 Campb. 369, *supra*;) but it has been held, that if the factor make such demand before the right of stoppage *in transitu* is determined, he will be entitled to bring trover in his own name for the goods, although the bill of lading was endorsed to him without consideration, and for the mere purpose of enabling him to exercise that right. *Morison v. Gray*, 2 Bing. 260.”

(A. ¶ Ante, 129. *Hudson v. Granger*, 5 Barn. & Ald. 27. *Warner v. M'Kay*, 1 Mees. & Wels. 591. *Brander v. Phillips*, 16 Peters. 121, 129. ¶

(a) *Drinkwater v. Goodwin*, Cowp. 256.

(b) *Atkyn v. Amber*, 2 Esp. Cas. 493.

not answerable to his principal for the debt.(c) And is not affected by the circumstance of his being known at the time of the contract to be an agent.(d)

It seems therefore to follow, that if the debtor, after notice and tender of an indemnity by the factor, should nevertheless pay the principal, that he would be answerable to the factor in an action. But he does not seem bound to refrain from paying *the principal with- [*366] out an indemnity from the agent.(e)

The right which is founded upon the factor's lien for his advances, does not depend upon his being answerable to the principal for the debt. But upon this latter ground also, independent of the former, an agent acting upon a *del credere* commission, has a lien upon the price of the goods sold by him. Therefore, as between the buyer and an agent of this description, the latter is considered as the sole owner of the goods.(f)

It has been determined that an agent's parting with the lien which he has upon goods in his possession, is a good consideration for a promise, by a third person, to pay him the amount of his lien. And that such an undertaking need not be in writing, as being for the debt of another. Castling, a policy broker, who had a lien upon certain policies for his acceptances, gave up those policies to Aubert,

(c) Cowp. 256.

(d) Ib. and 2 Esp. Cas. 493. In the latter case, the sale-note expressed that the sale was by the plaintiff, as agent of H.

(e) Cowp. 255. ¶ Whether the debtor can insist upon such indemnity from the agent, appears to be questionable. Mr. Russell says ; " It appears to be taken for granted, that in such cases third parties are entitled to an offer of an indemnity from the factor ; and it is believed that in practice, such indemnity is usually offered ; although whether this be absolutely essential in order to the security of the factor's rights, may admit of question." Fact. & Brok. 247. And Mr. Justice Story, (Agency, § 409,) observes, " It seems at least a questionable point, whether there is any principle of law, which positively requires such an indemnity, or offer of indemnity."¶

(f) Per Chambre, J., 3 Bos. & Pull. 489. † The misapprehension of the author upon this subject has been noticed and corrected, ante, p. 111, (3), and p. 286.†

to whom the principal had transferred his business upon Aubert's verbal undertaking to lodge money for the payment of Castling's acceptances. An action was held to be sustainable upon this undertaking: and the transaction being considered as a purchase of Castling's interest [*367] in the policies, was held to *have no relation to the Statute of Frauds, which avoids parol promises to pay the *debt*, or answer for the *default* or *miscarriage* of *another*.(g) (A)

(g) *Castling v. Aubert*, 2 East, 325. † A detriment sustained by the party to whom the promise is made, at the instance of the other, is as good a consideration as a direct benefit to the party promising.†

(A) ¶ A commission merchant having received goods to sell at a certain limited price, and made advances upon them, has a right to reimburse himself by selling them at the fair market price, though below the limit, if the consignor has refused upon application, and after a reasonable time, to repay the advances. Wilde, J. delivering the opinion of the court said; "The jury were instructed, 'that a commission merchant having received goods to sell at a certain limited price, and made advances upon such goods, had a right to reimburse himself by selling such goods at the fair market price, though below the limit, if the consignor refused upon application and after a reasonable time, to repay the advances.' The rule of law thus laid down, appears to the court to have been stated with perfect accuracy, and with all the qualifications which are applicable to the defendants' right of sale, as claimed by them on the evidence. The law appears to be well settled, both in England and in this country, that the pledgee of personal property, after the debt becomes due, may sell without a judicial process and decree of foreclosure, upon giving reasonable notice to the debtor to redeem. The principle thus settled seems to be founded in good sense, and may be essentially necessary to enable the pledgee to avail himself of his pledge in a reasonable manner for the discharge of his demand. In the present case, the defendants were not merely pledgees, but they were expressly authorized to sell the property consigned to them, and thereby to reimburse themselves for their advances. There was no time limited within which the sale was to have been made. The defendants were therefore bound by their acceptance of the consignment to wait a reasonable time, if the sale could not be made for the price limited, although by the delay their security might be impaired. But after such a reasonable time had elapsed, and a demand had been made upon the plaintiff to repay the money advanced, and he had refused so to do, he had no further power, by any principle of law or justice, to control the defendants' right of sale to their prejudice. Such a power would be inconsistent with the understanding of the

parties, as it must be presumed to have been when the advances were made ; and it would enable the plaintiff to impair the defendants' security at his own will and pleasure for an unlimited time if he were disposed so to do. To sanction such a right would operate injuriously on the interest of consignees, and would check the continuance of those large advances by the aid of which a flourishing trade has been carried on for years past, to the great profit of the mercantile community. For although such advances may sometimes lead to overtrading, and may induce individuals to venture upon rash speculations, yet it cannot be doubted, that on the whole they have contributed to the increase of the wealth and prosperity of the country. The principle therefore, involved in this case is of great importance, and has been considered by the court with great care." *Parker v. Brancker*, 22 Pick. 40. In *Pothonier v. Dawson*, Holt's N. P. Rep. 383, Gibbs, C. J. said ; " Undoubtedly as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this:—' If I (the borrower) repay the money, you must re-deliver the goods ; but if I fail to repay it, you may use the security I have left, to repay yourself.' I think, therefore, the defendant had a right to sell."

Whenever a consignment is made to a factor for sale, the consignor has a right generally, to control the sale thereof according to his own pleasure, from time to time, if no advances have been made, or liabilities incurred on account thereof ; and the factor is bound to obey his orders. If however the factor make advances, or incur liabilities on account of the consignment, by which he acquires a special property in the goods, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances, or meet such liabilities, unless there is some agreement between himself and the consignor which contracts or varies this right ; and this right of the factor to sell to reimburse himself applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity. *Brown v. McGran*, 14 Peters, 479, 495. 2 Kent's Comm. 639.

That the factor's lien does not preclude him from availing himself of his personal remedy against his principal, see ante, 127, n. (A.) *Beckwith v. Sibley*, 11 Pick. 482. As to waiver by factor of the personal responsibility of principal, see *Consequa v. Fanning*, 3 Johns. Ch. Rep. 600 ; *Oakley v. Crenshaw*, 4 Cow. 250 ; *Robertson v. Livingston*, 5 Cow. 473.

If a factor employ a sub-agent for the purpose of carrying into effect the orders of his principal, and such sub-agent, by neglecting the instructions of the factor, commits a breach of duty for which the factor is compelled to answer his principal in damages, the factor will be entitled to recover from the sub-agent the damages which he has so sustained. *Mainwaring v. Brandon*, 8 Taunt. 202 ; *Russ. Fact. & Brok.* 256 ; ante, 32, n. (2).||

CHAPTER VI.

OF THE PERSONAL LIABILITY OF AGENTS.

SECTION 1.

1. It now remains to be considered in what cases the agent is personally liable to those who deal with him.

In general, where a man is known, to act merely as an agent, where the principal is known, and there is no express engagement by the agent, nor circumstances from which it may be inferred, that the credit is given to him, the rule is, that the agent, though the person immediately making the contract, is not subject to personal responsibility. It is laid down by very old authority, that if a servant by express words do not bind himself, if the thing come to the use of his master, he is not liable at all.^(a) No rule of law, it has been said, is better ascertained, or stands upon a stronger foundation than this, that where an agent names his principal, [*369] the principal is responsible and not *the agent.^(b)

And factors or brokers, therefore, acting for their principals, under a proper authority, are not, in general, liable in their individual capacities.^(c) The question, indeed, is simply to whom the credit is given, whether to the principal alone, or the agent alone, or to both jointly ;^(Δ) as ap-

(a) *Goodhaylie's case*, Dy. 230 a.

(b) Per Lord Erskine, *Ex parte Hartop*, 12 Ves. 352.

(c) Per Lord Ch. Talbot, 3 P. Wms. 279. || Ante, 246, 247.||

(Δ) || *Beebe v. Robert*, 12 Wend. 417. The rule which prevents a vendor, who has given credit to an agent, from afterwards resorting to the principal for payment, does not apply to a case in which the vendor, at the

pears by the following case. This was an action for work done. The order was proved to have been given by *Gooch*, the defendant. The defence was, that work was ordered for another person named *Tippel*; that the work in question was done at *Tippel's* house, and that the plaintiff, at the time of the order, was informed that the work was on *Tippel's* account. The entry also in the plaintiff's books was, "*Tippel*, by the order of *Gooch*." Lord Kenyon: "The mere act of ordering the goods for another does not make the person giving the order liable. If a man order goods, though, they be in fact for another, yet if the tradesman were not informed at the time that they were so, he who ordered them is certainly liable; for the tradesman must be presumed to have looked to his credit only. So if they were ordered for another person, and the tradesman refuse to deliver them to that person's credit, but to his only who ordered them, there is then no pretext for charging such third person: *or, if the goods were [*370] ordered to be delivered on account of another, and after the delivery, the person who gave the order refuses to inform the tradesman who the principal is, that he may sue him; under such circumstances he is himself liable. But wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable. In this case the plaintiff was informed of all the circumstances; *Gooch* gave the order for *Tippel*; the goods were sent *Tippel's* house, and the entry made in his name. There is no color for making *Gooch* the debtor."(d)

time of sale, merely has the means of knowing the principal, but is confined to cases in which he has actual knowledge. *Raymond v. The Proprietors of the Crown and Eagle Mills*, 2 Metc. 319.||

(d) *Owen v. Gooch*, 2 Esp. 567. || A person who assumes to contract as an agent must see to it, that his principal is legally bound by his act; for if he does not give a right of action against his principal, the law holds him

The following case is an authority in confirmation of the same principle. *Stamper* had furnished lace for the King's hunt, according to the order of one *Graham*, master of the hunt to King James the Second, and upon the departure of the King brought an action against *Graham* for the amount, in which he recovered. *Graham* filed a bill for relief. It appeared by the day-book of *Stamper* that he had also an account with *Graham*, which was kept separate from that on account of the King; that the articles furnished for the King's use were entered without [*371] price, that it might be added in the ledger according to the prospect of payment; declarations were also proved by him that he expected payment from the privy purse. The court held that if the law should be, that he that speaks for or fetches goods for his master, without any particular promise to pay for them, is liable to pay for them, which they seemed to doubt, yet on these circumstances the plaintiff is entitled to relief.(e)

2. In order, however, to confine the credit to the principal, it is in general necessary that he should be known as the responsible person.(f) And therefore an agent may become liable upon contracts made by him in that capacity; *first*, where the principal is not known; *secondly*, where there is no responsible principal (except in the case of public agents;) *thirdly*, where he becomes liable by any undertaking of his own.(g)

personally responsible. *Randall v. Van Vechten*, 19 Johns. Rep. 63; *Mauri v. Heffernan*, 13 Johns. Rep. 58; *Skinner v. Dayton*, 19 Johns. Rep. 558; *Mott v. Hicks*, 1 Cowen, 536; *Stone v. Wood*, 7 Cowen, 454; *Arfridson v. Ladd*, 12 Mass. Rep. 174; 2 Liv. Pr. & Ag. 247.¶

(e) *Graham v. Stamper*, 2 Vern. 146; Eq. Ca. Ab.

(f) 12 Ves. 352.

(g) *De Gelder v. Savory*, 2 Keb. 812. ¶ "It is a general rule standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he

First, Where the principal is not known. After a verdict obtained by the vendor of goods a motion was made for a new trial, on the ground that though the goods were sold to the defendant, yet it was for the use of another, and that the receipts were so. But the court declared, that if a factor or servant buy goods generally, and do not upon the contract declare that he buys only as a factor, *or servant, he is chargeable in his own right; and [*372] judgment was given for the plaintiff. And in all cases where a factor delivers goods as his own, and conceals his principal, he is to be taken to all intents as the principal.^(h) This notification of the principal must be at the time of the contract. It is not sufficient ‡ for the purpose of discharging the agent‡ to make it afterwards. Thus, in an action for the non-delivery of goods, it appeared that the defendant had entered into and signed a written contract, engaging to deliver certain goods to the plaintiff, which he had failed to do. The defence was, that the defendant was merely a factor, and that this was known to the plaintiff before the action brought, but subsequent to the contract. Lord Ellenborough was of opinion that the defendant was liable, the principal not having been notified at the time, and no subsequent act being done to show that the plaintiff waived the liability of the defendant, and relied upon the principal [alone].⁽ⁱ⁾ And though it be known that the agent acts in a representative character, yet, if the principal be not known, he is bound personal-

exceeds his power." 2 Kent's Comm. 630. This is a terse and comprehensive summary of the whole doctrine. See *Harper v. Williams*, 4 Ad. & Ellis N. S. 232; *Amos v. Temperly*, 8 Mee. & Wels. 798; *Mauri v. Heffernan*, 13 Johns. Rep. 58; *Rathbon v. Budlong*, 15 Johns. Rep. 1; *Mott v. Hicks*, 1 Cow. 513; *Dubois v. The Delaware & Hudson Canal Co.*, 4 Wend. 285; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Meyer v. Barker*, 6 Binney, 234; *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Hastings v. Lovering*, 2 Pick. 221; ante, 370, n. (d); post, 378, 386 ¶

(h) Per Lord Mansfield, 7 T. R. 350; ante, p. 280.

(i) *Morgan v. Corder*. Sittings after Easter Term, 1809. Guildhall.

ly.(A) Thus, an auctioneer, who did not disclose his principal at the time of the sale, has been held personally liable, *upon the non-execution of the contract of sale.(j)

Factors, † who are agents of merchants‡ resident abroad, are, for the same reason, generally liable in their own persons, for the credit is presumed to be given to them.(k) However, if a factor load goods on board a ship generally, the principals and the lading, but not the factor himself, are liable for the freight.(l)

[But where a bill of lading, which directs the goods to be delivered *to order, or to assigns paying freight*, is indorsed by the consignee to his agent, the latter is liable for the freight, although he may have paid over the proceeds

(A) ¶ “A party who would excuse himself from responsibility, on the ground that in making the contract he acted as the agent of another, ought to show that he communicated to the other party his situation as agent, and that he acted in that capacity so as to give a remedy over against his principal; for the engagements which an agent contracts in his own name, although relative to the business of his principal, and for the benefit of that principal, are obligatory upon the agent.” 2 Liv. Pr. & Ag. 247; Russ. Fact. & Brok. 287; *Mauri v. Heffernan*, 13 Johns. Rep. 58, 77; *Randall v. Van Vechten*, 19 Johns. Rep. 63; *McComb v. Wright*, 4 Johns. Ch. Rep. 659, 669; *Waring v. Mason*, 18 Wend. 425; *Mills v. Hunt*, 20 Wend. 431; *Brockway v. Allen*, 17 Wend. 40; *Taintor v. Prendergast*, 3 Hill, 72.¶

(j) *Hanson v. Roberdeau*, Peake, N. P. C. 120. ¶ Acc. *Mills v. Hunt*, 20 Wend. 431.¶

(k) Bull. N. P. 130; † *De Gaillon v. L'Aigle*, 1 B. & P. 368, per Eyre, C. J.; *Paterson v. Gandasequi*, 15 East, 62; *Thomson v. Davenport*, 9 B. & C. 78; Dan. & Lloyd, 278; ante, p. 249; † ¶ Russ. Fact. & Brok. 288. But see ante, 248, n. 5, and *Kirkpatrick v. Stainer*, there cited at some length. *Taintor v. Prendergast*, 3 Hill, 72.¶

(l) 2 Moll. 381. † The rule is stated by Lord Tenterden, in “The Treatise on Shipping,” thus: “If a consignee receive goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he, by such receipt, makes himself debtor for the freight, and may be sued first. But a person who is only an *agent* for the consignor, and who is known to the master to be acting in that character, does not make himself personally answerable for the freight by receiving the goods, although he also enters them in his own name at the custom house.” 5th ed. 286.†

to his employers before the freight was demanded of him.](1) † And the rule applies equally, though the words “or to assigns” do not appear in the bill of lading, on *the ground that “if a person accept any thing [*374] which he knows to be subject to a duty or charge, it is rational to conclude that he means to take that duty or charge on himself; and the law may very well imply a promise to perform what he so takes upon himself.”(2)† [It does not, however, seem to apply to a case where the goods are delivered, not on the bill of lading, but upon an express order from the principal to deliver them to the broker, notwithstanding the broker may, at the time be endorsee of the bill of lading, unless, from the general habit of dealing between the parties, an implied promise, on the part of the broker, to pay the freight, can be raised.(3)]

(1) [*Bell v. Kymer*, 5 Taunt. 477 ;] † *Dougal v. Kemble*, 3 Bingh. 383.†

(2) † *Renteria v. Ruding*, Lloyd & Welsby, 274 ;† || S. C. 1 Moody & Malk. 511.||

(3) [*Wilson v. Kymer*, 1 M. & S. 157.] || Notwithstanding what is stated above, the rule appears to be, that a factor is not liable for the freight of goods which he receives under a bill of lading, on the face of which it appears that he acts as a mere agent for the consignor. Russ. Fact. & Brok. 293. Thus, in *Amos v. Temperley*, 8 Mees. & Wels. 798, 804. Parke, B. who delivered the judgment of the court said: “The facts proved on the trial were, that the plaintiff received on board of a vessel of his, a quantity of coals from the Burnt Island Company, to be carried to London; the captain signed a bill of lading, by which the coals were made deliverable to the defendant *for the London Gas Company*, or to his assigns, he or they paying for the freight at a specified rate. On the arrival of the coals in London, the defendant produced the bill of lading, and received the coals under it; and afterwards offered to pay the freight by a bill at two months. The question is, whether he was personally liable for the freights.—We are of opinion that the defendant was not personally liable.—The case of *Cook v. Taylor*, 13 East, 399, established the proposition, that the receipt of goods by an endorsee of a bill of lading, by which they were made deliverable to the consignee or his assigns, he or they paying freight, was evidence of a new contract between him and the shipowner to pay the freight according to the bill of lading; and that case has been followed by many others. But here the defendant is, on the face of the bill of lading, a mere agent to receive the goods, the London Gas Company being the consignees, and the property vesting in them;—and the promise to be inferred from the receipt

2. Secondly, Persons, though contracting only as agents, are nevertheless generally liable where there is no respon-

of the goods under such a bill of lading is, *prima facie*, a promise by the defendant *as agent* for the company, to pay the freight on their account, and not a promise to be personally responsible for it ; and there was no sufficient evidence to the contrary. Upon the subsequent offer to pay in a bill, no reliance ought justly to be placed as any proof of personal liability."

Although the acceptance of the goods by the consignee, under the ordinary bill of lading, renders him liable for the freight, it does not subject him to further liability ;—as for the payment of general average. Lord Tenterden, Ch. J. "there can be no doubt that if a person receives goods in pursuance of a bill of lading, in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication engages to pay freight, and so he would to pay general average if that were mentioned in the bill of lading. But here general average is not so mentioned. It is true that the master has a lien on the goods for general average, and if he had exercised that right, and informed the defendant that if he took the goods he must pay the general average, and the defendant after such notice had taken the goods, there would then have been an implied, if not an express contract on his part to pay it. It is said, that as the defendant had notice that the goods were subject to this charge before he received them, he is therefore, liable to pay it. But I think the law will not imply a contract from the mere fact of knowledge that the goods were subject to a charge, unless it were accompanied with notice from the shipowner that he would insist upon his right of lien. If there had been any established usage that a consignee should pay general average, that would have been evidence of an agreement on the part of the defendant to pay it in this case ; but no such general usage is found.—A consignee who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability. There is no other person to pay it. But a mere consignee who is not the owner, is not liable, unless before he receives them he is informed by the shipowner, or the master, that if he takes them he must pay it." Littledale, J. "There is no doubt that a consignee, not the owner of goods, who receives them in pursuance of a bill of lading, in which it is expressed that they are to be delivered to him, he paying freight or demurrage, is liable to those charges ; but then he is so liable by reason of a special contract implied by law from the fact of his having accepted goods which were to be delivered to him only on condition of his paying freight and demurrage." Parke, J. speaks to the same effect. "The cases in which a mere consignee, not the owner of goods, has been held liable to freight or demurrage proceed on the ground, that his acceptance of the goods in pursuance of a bill of lading, whereby the shipper has expressly made the payment of freight or demurrage a condition precedent to their delivery, is

sible principal to resort to. As in the following instances :
An act of Parliament was passed for making a river navi-

evidence of a contract by the consignee to pay such demand." *Scaif v. Tobin*, 3 Barn. & Ad. 523.

It seems, that the default of the factor or consignee, does not discharge the principal, or consignor, or owner of the goods, from the payment of freight ; and that the consignor or owner of the goods by putting the goods on board, undertakes to the shipowner that he shall be paid for the transportation. So, in *Barker v. Havens*, 17 Johns. Rep. 234, Spencer, C. J. delivering the opinion of the court said :—" The plaintiff's right to recover freight depends on the legal import of the clause in the bill of lading by which it is stipulated that the goods should be delivered to C. B. & Co., ' they paying freight for the same, one penny sterling per pound, with primage and average accustomed.' The effect of this clause has been repeatedly considered in the English courts, and the decisions have been uniform in both the King's Bench and Common Pleas. In *Shepherd v. De Bernales*, (13 East, 508,) Lord Ellenborough examined all the cases ; and he considered the clause introduced for the benefit of the carrier of the goods only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad, before he should make delivery of the goods ; and that he had a right to waive the benefit of that provision in his favor, and to deliver, without first receiving payment, and was not precluded by such delivery, from afterwards maintaining an action against the consignor. He observes, that the cases he cited proved that such a clause did not in general cast the duty on the captain at his peril, of obtaining freight from the consignee ; but that if he could not get it from him, he may insist on having it from the consignor. He admits that the rule might be otherwise in a case differently circumstanced ; and he lays stress on the fact, that the delivery was to be to the correspondents, factors and agents of the defendant. I should clearly be of opinion, that if the goods were not owned by the consignor, and were not shipped on his account and for his benefit, that the carrier would not be entitled to call on the consignor for freight ; and I should incline to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee. In the present case there can be no doubt that the cotton was the property of the defendant when shipped, and that it was consigned to C. B. & Co. to be sold on the defendant's account ; for he exhibited C. B. & Co.'s account by which it appeared that the defendant was charged with the freight and primage which had been deducted from the proceeds of the cotton, and the balance had been paid to the defendant. It is evident however, that C. B. & Co. never paid the freight on being required by the captain to do so after the delivery of the cotton, but declined to pay it, on the ground, &c." But see *Tobin v. Crawford*, 9 Mees. & Wels. 716 ; S. C. 5 Mees. & Wels. 235 ; *Drew v. Bird*, 1 Moody & Malk. 156.||

gable, giving power to certain commissioners to raise and borrow money upon the tolls of the navigation. The acting commissioners gave orders at their meetings for work to be done in making cuts, &c. The work being completed, the commissioners declined paying, alleging that they had no trust-money left. The plaintiff brought his bill against all the acting commissioners: when the [*375] Court of *Chancery(*m*) declared the commissioners who acted under the trust to be personally liable to all the contracts, as well those which were made at the meetings when they were not present, as at those when they were. It was said by the court, that the commissioners had power to borrow money, and ought to take care to be provided. That the workmen who engaged to do the work could not know the state of the fund, nor was it their business to inquire; they gave credit to the commissioners: the plaintiff could not be considered as giving credit to the success of the undertaking.(*n*)

Again: A. agreed with B. and C. to pave their streets in *Putney*: and they, on behalf of the parish, agreed to pay him. The work being done according to the agreement, A. filed a bill against B. and C., and it was held that they were liable, and must take their remedy over against the rest of the parish.(*o*)

(*m*) Lord Bathurst, assisted by Mr. Justice Gould and Mr. Justice Ashurst.

(*n*) *Horsley v. Bell and others*, Ambl. 769, 772.

(*o*) *Myriel v. Hymondsold*, Hardr. 205. So it was holden that a bill might be supported against the committee of a club for an agreement entered into by them, on account of the club, without making the rest of the subscribers parties. *Cullen v. The Duke of Queensbery*, 1 Br. Ch. Rep. 101, affirmed D. P. March 27, 1787. So where the commissioners of a navigation act entered into an agreement with an engineer, they were holden to be personally liable; *Horsley v. Bell*, Ambl. 770; 1 Br. Ch. R. 101, in note. [In an anonymous case in 12 Mod. 559, it is reported to have been held by Lord Holt, that "if an overseer of the poor contract with tradesmen upon account of the poor, and upon his own credit, as soon as he receives so much of the poor's money, it becomes his own debt."] † In *Eaton v. Bell*, 5 B. & A. 34, commissioners under an inclosure act were

*This rule, however, is subject to one exception, [*376] which is, the case of *agents of Government*, acting in that capacity for the public, who, from the supposition that their office excludes the presumption of credit being given to them personally, are not held liable for the contracts made by them merely in their public capacity, although there be no other person against whom a legal remedy lies to enforce the contract. An agent of Government, known to act merely in that capacity, and not making himself liable by any *thing amounting [*377] to a personal contract, is not answerable for articles furnished by his order.(p) And it has been laid down that in any case where a man acts as agent for the public, and treats in that capacity, there is no pretence for making him personally liable.(q) *The Governor of Quebec*, by whose

held personally responsible upon bills drawn by them upon their bankers in the following form: "Fordham Inclosure, Oct. 15, 1810. Messrs. —, pay to J. M. or bearer, £—, on account of the public drainage, and place the same to our account, *as commissioners* of the above inclosure;" and see post, § 381.¶

A person attending a vestry meeting, and together with other parishioners authorizing repairs of the church, is not liable to an action of assumpsit for contribution at the suit of the church-wardens, by whom those expenses have been defrayed; *Lanchester v. Tricker*, 1 Bingh. 201; *Lanchester v. Frewer*, 2 Bingh. 361. But it has been lately decided, that a member of a committee for managing the affairs of a charitable institution, though giving his services gratuitously, is liable personally for goods supplied by tradesmen to the use of the institution, though not shown to have given any orders, and not even known to the tradesmen as a member; *Burke v. Smith*, 7 Bingh. 705; and see *Doubleday v. Muskett*, Ib. 110.‡

(p) *M'Beath v. Haldimand*, 1 T. R. 172. [It was decided in *Bowen v. Morris*, 2 Taunt. 374, that the mayor of a corporation, who, on the sale of certain lands by auction, of which the corporation were vendors, contracted on the behalf of the corporation, and mutually with the purchaser, for the due performance of the conditions of sale, could not, in his individual capacity, maintain an action against the purchaser for a breach of his contract,] ‡ on the ground that as he acted avowedly in the capacity of agent for the corporation, he would not be personally liable on the contract; and Mansfield, Ch. J. said, that the case was within the principle of *M'Beath v. Haldimand*.‡

(q) 1 T. R. 180. ¶ "There is a distinction in the books between public

order various articles had been supplied for the use of the settlement, was deemed not to be answerable personally for the price of them.(r) And a *commissary* general has been held not liable for forage supplied by his order.(s) The same principle has been extended to the case of a commander of a ship of war, who, having by a charter-party covenanted *on account of the King* for the performance of certain articles, was held not to be liable in an action upon that covenant.(t)

and private agents, on the point of personal responsibility. If an agent on behalf of government makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government; and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn from all the cases, and it is expressly declared in some of them." 2 Kent's Comm. 632, 633; and see *Jones v. La Tombe*, 3 Dallas, 384; *Gill v. Brown*, 12 Johns. Rep. 385; *Rathbon v. Budlong*, 15 Johns. Rep. 1; *Randall v. Van Vechten*, 19 Johns. Rep. 63; *Stone v. Wood*, 7 Cow. 455; *Fox v. Drake*, 8 Cow. 191; *Brown v. Austin*, 1 Mass. Rep. 208; *Adams v. Whittlesey*, 3 Conn. Rep. 560; and the cases cited *infra*, n. (t) But if a public agent should deny to the government that he had entered into such contract, and by such interference prevent the party from his remedy as against the government, he must be personally liable, as he has by his conduct in effect disavowed his acting in the character of a public agent. *Freeman v. Otis*, 9 Mass. Rep. 272.¶

(r) 1 T. R. 172.

(s) 1 T. R. 180.

(t) *Unwin v. Wolseley*, 1 T. R. 674. Vide 1 East, 135, 579. ¶ So, in an action of covenant against the defendant, who having as Secretary of War, taken a lease of certain buildings in the city of Washington, for the use of the war department, and the buildings having been destroyed by fire, it was held that the defendant was not liable on the covenant to keep the buildings leased in good and sufficient repair. The lease which was under seal commenced thus; "This indenture made the 14th day of August, in the year of our Lord, 1800, between Joseph Hodgson of the city of

*3 Thirdly, Agents are liable upon contracts [*378]

Washington and territory of Columbia, of the one part, and Samuel Dexter of the same place Secretary of War of the other part, witnesseth that the said J. H. for and in consideration of the sum of &c., to him in hand paid by the said S. D. at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath demised &c., and by these presents doth demise, &c., to the said S. D. *and his successors*, all &c., to have and to hold the said demised premises unto him the said S. D. *and his successors* for and during" the term specified. The plaintiff then covenanted with "the said S. D. *and his successors*, that he the said S. D. *and his successors*," should have quiet enjoyment. The covenant on which the suit was brought next follows, in these words; "And the said S. D. for himself *and his successors* doth hereby covenant, promise and agree to and with the said J. H. his heirs and assigns, that he the said S. D. *and his successors*, shall and will at all times during the said term, keep or cause to be kept in good and sufficient repair the said premises, inevitable casualties and ordinary decay excepted; and the same so well and sufficiently kept in repair, shall and will at the end of the said term, yield and surrender up to him the said J. H. his heirs and assigns." Whether the casualty by which the buildings were destroyed was inevitable did not enter into consideration, the court being unanimous that the defendant was not bound in his private capacity. Marshall, C. J. delivering their opinion said; "It is too clear to be controverted, that when a public agent acts in the line of his duty and by legal authority, his contracts made on account of the government are public and not personal. They enure to the benefit of and are obligatory upon the government and not the officer. A contrary doctrine would be productive of the most injurious consequences to the public as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macheath v. Haldimand*; and this court considers the principles as laid down in that case as consonant to policy, justice and law. The plaintiff has not controverted the general principles; but has insisted that in this case the defendant has, by the terms of his contract, bound himself personally. It is admitted, that the house was taken on account of the public, in pursuance of the proper authority; and that the contract was made by the person at the head of the department for the use of which it was taken; nor is there any allegation, nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the government, or that he was unwilling to contract on the faith of government. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract. The court can perceive no such intent. On the contrary, the contract exhibits every

made on behalf of their principals, where they individually

appearance of being made with a view entirely to the government. The official character of the defendant is stated in the description of the parties. The tenement is let to "the said Samuel Dexter and his successors;" an expression plainly evidencing that it was not for himself, otherwise than as Secretary of War; and that the lessor so understood the contract. It is also evincive of the correctness of the observation of the defendant that the words, "said Samuel Dexter," refer to him in his official character, as described in the premises. The *habendum* is "to have and to hold the said demised premises to him the said S. D. and his successors" &c., showing that to the knowledge of the lessor, if Mr. Dexter should go out of office the next day, the successor to the war department would succeed also to the occupancy of the office. The covenant for quiet enjoyment during the term is with the said S. D. and his successors, and is, that they as well as he shall enjoy. The covenant on the part of Mr. D. upon which the suit is brought, is for himself and his successors. The whole face of the agreement then manifests very clearly a contract made entirely on public account, without a view either on the part of the lessor or lessee, to the private advantage or responsibility of Mr. D. The only circumstance which could excite a doubt was produced by the technical operation of the seal. This, in plain reason and common sense, can make no difference in designating the person to be responsible for the contract; and so it was determined in the case of *Unwin v. Wolseley*." *Hodgson v. Dexter*, 1 Cranch, 345. The principle of the cases of *Macbeath v. Haldimand*, and *Hodgson v. Dexter*, was pursued by the Supreme Court of New York, in the case which will next be stated, notwithstanding the extraordinary decision of that court in an intermediate case (*Sheffield v. Watson*, 3 Caines, 69,) of which it would be useless to give an analysis, (which however may be found, 2 Liv. Pr. & Ag. 273,) as it was completely overturned by the subsequent decision of the same court, which was as follows.—The defendant was Quarter Master General of the army of the United States, which arrived at French Mills, in the county of Franklin, about the 20th of November, 1813. The defendant directed certain boatmen, who were with the army, and the plaintiff among the rest, to go to work for the use of the army, and that they should be each allowed two dollars per day and one ration. The plaintiff accordingly worked in making tents &c., for the hospital department, and laying up the boats and rigging. After working about six weeks, the defendant being about leaving French Mills, the plaintiff applied to him for a certificate, as evidence of the contract, and of the time he had worked; and the defendant replied, "my word is sufficient;" and told the plaintiff to go to work, and he would pay him when his work was done. The plaintiff continued to work until the 20th of February, 1814, when he was discharged without receiving any pay. A verdict having been found for the plaintiff, subject to the opinion of the court,

bind themselves by their own undertaking. As in the following cases:—

upon a case; the court, Thompson, Ch. J. *dissentiente*, rendered judgment for the defendant. Spencer, J. delivering their opinion said; “whether the court in *Sheffield v. Watson*, made a correct application of the principles recognized and established in these two cases, [*i. e. Macbeath v. Haldimand*, and *Hodgson v. Dexter*,] to the facts before them, may I think, admit of some doubt; but certainly we did not intend to overrule them. We have all of us had occasion to remark, that though we concur in the point decided, unless our dissent be stated, yet we are not committed by the illustrations of the judge who happens to give the opinion. I make this remark here, because I confess, the train of the judge’s [Mr. J. Livingston,] reasoning in *Sheffield v. Watson*, does not appear to me perfectly reconcilable with the declaration which I am fully convinced is correct, that we did not intend to shake any of the English authorities. I shall forbear stating the particular circumstances in *Sheffield v. Watson*, which *may* distinguish that case from the two leading ones already cited.” The learned judge after commenting on those cases proceeds; “It has been argued in this case, that the defendant promised to pay the plaintiff for his work when it was done. The same argument was urged in *Hodgson v. Dexter*, and the fact in that case was, that Mr. Dexter covenanted under his seal, to keep the premises in good repair, inevitable casualties &c., excepted, and to yield up the same at the end of the term, the same so well and sufficiently kept in repair; but the court holding it to be a contract entirely on behalf of government, considered the obligation to be on the government only, and not a personal undertaking. The facts in this case show very clearly, that it never was in the contemplation of either party originally, nor until some time after the labor was done, that the defendant should be personally responsible. The plaintiff was employed on the public account, to proceed down the St. Lawrence as a boatman with the army, and received a certificate of his being thus employed. On his arrival at the French Mills with the army, the defendant who was known to the plaintiff to be Quarter Master General, and acted as such, directed the plaintiff to go to work with the rest of the hands, for the army, and that they should each be allowed two dollars a day. The plaintiff after working about six weeks, learning that the defendant was about leaving the place, applied to him for a writing or certificate, as evidence of the contract, and the time he had worked. The plaintiff drew his rations from the public store house, and after leaving the French Mills applied to Major Brown, an Assistant Quarter Master General, stating that he had been to work for General Swartwout, but had nothing to show for his work, and did not know to whom, or where, to look for his pay; upon which Major Brown advanced him twenty dollars, as Assistant Quarter Master General. These facts abundantly show, that the defendant’s contract with the plaintiff was as a public agent, and that the plain-

An agent by writing acknowledged to have received

tiff did not work, nor contract to work, with a view to the defendant's personal responsibility, I entirely agree with Chief Justice Marshall, that to hold a public agent, acting in the line of his duty, liable for contracts made on account of government, would be productive of the most injurious consequences to the public as well as to individuals; and that no prudent man would consent to become a public agent, if he should be made personally responsible on the public account. This is not the case of an insulated boatman. The same principles which will render the defendant liable in this case will, for aught I perceive, make him liable to all the boatmen descending the St. Lawrence with the army; for it seems the defendant set them all at work at two dollars a day; and hence the greater improbability that he meant to subject himself." *Walker v. Swartwout*, 12 Johns. Rep. 444. So, where the committee of a turnpike corporation having covenanted under their hands and seals for the payment for work to be done for the corporation, Parsons, Ch. J. said; "A case of this kind is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state in discharging all contracts made by its agents in its behalf, cannot in a court of law be drawn into question." *Tippets v. Walker*, 4 Mass. Rep. 597. A superintendent of the canals is not personally responsible for work done, or materials found at his request, for the repair of the canals or works connected therewith, unless it is manifest that it was the intention of the parties that he should be personally liable. A naked promise to pay is not enough in such case to create a personal obligation. *Osborne v. Kerr*, 12 Wend. 179. An action will not lie against an officer of the army, on his promise to pay a reward offered for the apprehending a deserter, he acting in his official capacity, and as an agent for the government. *Belknap v. Reinhart*, 2 Wend. 375. Where one entered into a covenant as superintendent of the state prison, to furnish the labor of a certain number of convicts, to one who was to employ them, and failed to perform the contract, having at the time of the contract sufficient authority to make it, he was holden not to be personally liable thereon. *Dawes v. Jackson*, 9 Mass. Rep. 496. And see *Allen v. Waldgrave*, 8 Taunt. 566.¶

A commanding officer, present with his troop, is liable for subsistence furnished to his men, if he have actually received money from the paymaster, but not otherwise; unless perhaps where he is liable for the default of the paymaster by being his surety, or indebted to him on a private account. ¶ See *Thompson v. Pearce*, 1 B. & B. 25.¶ An action does not lie against a public officer by individuals for sums which, as a public officer, he is authorized to pay them, although he may have received the money applicable to that purpose: It was held, therefore, that *assumpsit* does not lie against the Secretary at War, by a retired clerk of the war office for

goods for his employer, and by the same writing bound himself to pay at a day certain, it was held by all the judges that *assumpsit* would lie against him.(u) So upon a memorandum by a servant in this form,(w) "Received of J. S. to the use of my master, the sum of 40*l.* to be paid at Michaelmas following," the servant was held liable.

A servant retained an attorney for his master and promised he should have his fees. The attorney recovered against the servant in an action of debt.(x)

A bill of exchange drawn upon an agent and accepted by him, generally binds him, at least against a third person.(A) The cashier of the York 'Buildings' [*379] Company, to whom a bill was addressed by the

his retired allowance, although the Secretary at War had received the money applicable to such allowance. *Gidley v. Lord Palmerston*, 3 Brod. & Bing. 275. A collector of the revenue is not personally liable in an action to recover back an excess of duties paid to him as collector, and by him in the regular or ordinary course of his duty paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or to sue to recover back the money given him. *Elliott v. Swartwout*, 10 Peters, 137. But, on the other hand, a collector of the revenue is generally liable in an action to recover back an excess of duties paid to him as collector, where the duties have been illegally demanded, and a protest of the illegality has been made at the time of payment, or notice given that the party means to contest the claim: nor is there any doubt that a like action generally lies, where the excess of duties has been paid under a mistake of fact, and notice thereof has been given to the collector before he has paid over the money to the government. *Bend v. Hoyt*, 13 Peters, 263.||

(u) Dy. 230, a.

(w) *Talbot v. Godbolt*, Yelv. 137; 4 B. Ab. 88.

(x) *Haines v. French*, Aleyn, 6. According to Roll, C. J. who cites the case, after judgment for the plaintiff in C. B. a rule was given to reverse it in B. R. notwithstanding the like judgment in *Bradford's case*: but he said the judgment was not reversed on the roll, and in his opinion it was good.

(A) || "We think it is settled by authorities, that when it is known that a party is acting as agent, or when a draft is addressed to him as agent, yet if he give or accept it in his own name, he is personally liable." Shaw, C. J. *Taber v. Cannon*, 8 Metc. 460; *The Bedford Commercial Ins. Co. v. Covell*, Id. 443.||

name of *J. B. cashier of the York Buildings' Company*, and by him accepted generally thus, "accepted, J. B." was held liable to the payee.^(y) But it was said that, perhaps, he would not be so to the drawer, who knew that the bill was drawn and accepted on account of the company.^(z)

‡ However, in a subsequent case, where an agent of a country bank, to whom a sum of money had been remitted by the plaintiff for the purpose of procuring a bill on London, drew in his own name for the amount on the firm in London, the two firms being the same; it was held that he was liable on this draft to the plaintiff, although the latter knew that he was agent, and supposed the bill to be drawn by him as such, and on account of the country bank to which the agent had paid over the money remitted; and the decision proceeded on this plain ground, that a written instrument cannot be explained by matter dehors.⁽⁴⁾‡ So where a merchant drew upon his factor in these terms, "Pay to Messrs. M. & Co., or order, [*380] 195*l.* out of the *produce of my goods, now lying at Gibraltar, &c. as soon as the same shall come to your hands, after paying the present acceptances;" to which the factor underwrote, "I agree to conform to this order," it was decided, that he was liable to the holder, having received assets, though the balance of accounts between him and his principal was in his favor.^(a) Thus also on a bill drawn upon an agent to be paid out of the drawer's half-pay when due, and which the agent promised to pay when he received any money of the drawer's, he was held liable upon proof of the receipt of money to the

^(y) Str. 955.

^(z) Id. ib.

⁽⁴⁾ ‡ *Leadbitter v. Farrow*, 5 M. & S. 345; and see *Eaton v. Bell*, ante, note (o). In one instance, however, where an agent was sued as indorser of bills by the indorsees, who knew that he had indorsed them as agent merely, and that he was under the necessity of doing so, an injunction was granted to restrain the action at law. *Kidson v. Dilworth*, 5 Price, 564.

^(a) 2 Bl. 1072.

amount of the bill, though the balance of accounts was in his favor.(b)

[So, as between himself and the principal, the agent by drawing or accepting a bill generally may render himself liable to the principal for the amount. Thus, where a broker procured a purchaser for goods, and drew a bill for the amount, payable to the principal, which was accepted by the purchaser, but dishonored; it was held, that the broker was answerable as drawer of the bill, on the acceptor's default.(5)]

[*An agent purchasing foreign bills for his prin- [*381] cipal, and indorsing them to him without any qualification, is liable to the principal on his indorsement, however small the commission may be which he gets upon the purchase.(6)]

So upon contracts of every description entered into by agents on behalf of their principals, as well by public agents as by others, if they bind themselves by a formal engagement, they are answerable in their own persons.(c)

(b) 5 Esp. 247. His lordship mentioned a case in which Lord Kenyon, under similar circumstances, had held that such an acceptance was an appropriation of so much to the use of the holder, and made the acceptor liable upon the receipt of any money upon the credit of which it was drawn.

(5) [*Le Feuvre v. Lloyd*, 1 Marsh. 319; 5 Taunt. 749, S. C.]

(6) [*Goupy v. Harden*, 7 Taunt. 159.]

(c) Per Ashurst, J. 1 T. R. 181. || *The Bank of Rochester v. Monteath*, 1 Denio, 402; *Magee v. Atkinson*, 2 Mees. & Wels. 440; *Pentz v. Stanton*, 10 Wend. 277; *Bradlee v. Boston Glass Manufactory*, 16 Pick. 347; *Tippets v. Walker*, 4 Mass. Rep. 595. And that, although in the contract, the agent describe himself as agent. *Infra*, n. 7. J. & H. Littledale, brokers at Liverpool, sold hemp by auction at their rooms, and gave an invoice describing the goods as bought of J. & H. L., and received part of the price, but failed to deliver the goods. An action being brought against them by the purchaser for non-delivery, and for money had and received: It was held, that the defendants had made themselves responsible as sellers, by the invoice; and could not defend themselves by evidence tending to show that they sold as agents, and had intimated that fact before and at the time of sale, and that the principals being indebted to them, the defendants, the invoice had been made out to them in their names, according to a custom of brokers in Liverpool, to secure the passing of the

Thus if a factor enter into a charter-party in his own

purchase money through their hands. Lord Denman, C. J. "There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds, until the invoice, by which the defendants represent themselves to be the sellers: and we think that they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible, and we think it impossible to read the invoice in the sense proposed." *Jones v. Littledale*, 6 Ad. & Ellis, 486. In an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods above the value of £10, it is not competent for the defendant to discharge himself, on an issue on the plea of *non-assumpsit*, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time the agreement was made and signed. Parke, B. delivering the judgment of the court said: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding upon those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal. But on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement which cannot be done. And this view of the law accords with the decisions not merely as to bills of exchange signed by a person without stating his agency on the face of the bill, but as to other written contracts. It is true that the case of *Jones v. Littledale*, (*ubi supra*,) might be supported on the ground that the agent really intended to contract as principal: but Lord Denman in delivering the judgment of the court lays down this as a general proposition—that if the agent contract in such a form as to make himself personally responsible, he can-

name, the contract obliges him for the freight; though when he loads aboard generally he is not liable.(d)

‡ So where a person, describing himself as "agent and consignee" of a vessel, entered into an agreement in his own name, "witnessing that the said parties thereto had agreed," &c. he was considered personally liable on the agreement.(7)

not afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. *Magee v. Atkinson*, (*ubi supra*,) is a direct authority and cannot be distinguished from this case." *Higgins v. Senior*, 8 Mees. & Wels. 833.¶

(d) 2 Moll. 331; 2 Atk. 623. ¶ Where a charter party was entered into by one as agent for the owners of a ship, most of the covenants in which were expressed to be made by him as agent, but the owners were not parties, nor were they named in any part of the instrument, and the charter party concluded, "for the performance of all the covenants before mentioned, the parties respectively bind themselves to each other personally," and the vessel, her tackle, &c. were bound *for the due performance of her owners, and agents or agent* to the charterer, it was held that the agent was personally responsible. *Meyer v. Barker*, 6 Binney, 234. And see *Stone v. Wood*, 7 Cow. 453.¶

(7) ‡ *Kennedy v. Gouveia*, 3 D. & R. 503.‡ ¶ A mere description of the person (*descriptio personæ*,) or designation of the character in which a party assumes to contract on behalf of another, does not necessarily exonerate him from liability to the other contracting party. It is not sufficient to charge the principal, or protect the agent from personal responsibility, merely to describe himself as agent, if the language of the instrument imports a personal contract on his part. *Pentz v. Stanton*, 10 Wend. 277; *Stone v. Wood*, 7 Cow. 453. As where the drawer of a note affixes his signature as the agent of another, the addition does not exonerate him. *Rossiter v. Rossiter*, 8 Wend. 494. The defendants who were executors of one T. T. deceased, made a promissory note in the following terms: "As executors to the late 'T. T. of R. we jointly and severally promise to pay to Mr. N. C. (the plaintiff,) the sum of £200 on demand, with lawful interest on the same." They were held personally liable. *Childs v. Mornins*, 2 Brod. & Bing. 460. So, where the defendants signed a promissory note, and added "Trustees of Union Religious Society, Phelps," they were held personally responsible. *Hills v. Bannister*, 8 Cow. 31. And where the defendants entered into a bond by the name of A. B. & C. "trustees of the Baptist Society of the town of R.," the addition of the words "trustees, &c." to the names of the defendants, was held to be a mere *descriptio personarum*. *Taft v. Brewster*, 9 Johns. Rep. 334. The defendant gave a promissory note in the following form; "For value received, I, T.

In like manner, an agent for the consignee of the cargo of a chartered vessel, who, in order to obtain possession of the goods from the shipowner, guaranteed to pay all charges and to stand in all respects in the place of the charterer, was held to be personally answerable for [*382] *demurrage, and that not only for the days which had run since the agreement, but for the whole.(8)

A fortiori therefore, an agent of foreign merchants was held bound by his guaranty, that the shipment should be made in conformity with the laws of Great Britain.(9)

So an agent who bought goods, and remitted bills for the price, which, though he did not indorse, he undertook to see paid, was considered as having made himself personally responsible for the goodness of the bills.(10)‡

A broker employed to sell goods taken in execution having promised the landlord, in consideration of his withdrawing his distress, to pay him the rent, was held to be personally liable; and that the promise, being an original undertaking, was not required to be in writing.(e)

F. as guardian of E. S. promise J. F. to pay him 203 dollars and 72 cents in six months and interest. T. F. guardian." The defendant was held liable personally for the payment of the note. *Forster v. Fuller*, 6 Mass. Rep. 58; *Thacher v. Dinsmore*, 5 Mass. Rep. 299. The administrators of an insolvent estate, under a license of court to sell the real estate of their intestate for the payment of his debts, sold an equity of redemption of which their intestate was supposed to die seised, and in their deed covenanted, in their said capacity of administrators, that they as administrators, were lawfully seised of the premises, that they have in their said capacity, good right to sell, &c., and that as administrators they will warrant and defend the same to the grantees and their heirs, &c. against the lawful claims of all persons; and they signed and sealed the deed as administrators: in an action against them upon the covenant to warrant &c. after an eviction by a paramount title, it was holden that they were answerable personally on their covenants. *Sumner v. Williams*, 8 Mass. Rep. 162. A note by which J. F. as president of an insurance company promises to pay a sum certain, is not the note of the company but of the maker alone. *Barker v. Mechanics' Fire Ins. Co.*, 3 Wend. 94 ¶

(8) ‡ *Benson v. Hippius*, 4 Bingham 455.‡

(9) ‡ *Redhead v. Cator*, 1 Stark. N. P. C. 14.‡

(10) ‡ *Morris v. Stacey*, Holt, N. P. C. 153.‡

(e) 3 Burr. 1886.

One who covenanted for himself, his heirs, &c. under his own hand and seal, for the act of another, was adjudged to be personally liable, though he described himself in the deed as covenanting for and on the part and behalf of such other person.(f) So a bond recited that *differences subsisted between I. F. and the [*383] plaintiff, and was conditioned to be void, if G. F., the defendant, for and on behalf of I. F., should perform the award of arbitrators. The award was made directing that the defendant should pay a certain sum, and that plaintiff and defendant should execute general releases. It was determined that the submission bound the defendant, and that the award was good.(g)

(f) *Appleton v. Binks*, 5 East, 148. || *White v. Skinner*, 13 Johns. Rep. 307; ante, 381, n. 7.|| In the case of *Cass v. Rudell*, 2 Vern. 280, the defendant, *on behalf of J. T.*, articed to purchase an estate in Jamaica, and covenanted on behalf of J. T. to pay 800*l.* On a bill filed for a specific performance of these articles, defendant insisted that he had not sufficient effects of J. T. in his hands, and that the performance of the agreement had been delayed by the plaintiff not making out a good title, and during the pendency of the suit the estate had been swallowed by an earthquake. But the Court of Chancery, notwithstanding the estate was gone, and the defendant had not sufficient effects of J. T., decreed a specific execution of the articles.

(g) *Clayhill v. Fitzgerald*, 1 Wils. 28, 58. || If an agent enter into a submission in his own name, he will be personally bound to perform the award: and where a bond of submission was entered into by A. and others, the widow and heirs of B., of the one part, and C. of the other part, the former covenanting that certain infant co-heirs should abide by the award, and the arbitrators awarded that C. should pay the other parties a specified sum of money, it was held that though the submission was unauthorized in respect to the infants, the award was binding as between the parties. Nelson, C. J. delivering the opinion of the court said: "It is well settled that an agent entering into a submission to arbitration in his own name is personally bound to perform the award. Where a parson on the one hand, and some of his parishioners on the other, in behalf of themselves and the rest of the inhabitants of the parish, but without their authority, submitted a dispute to arbitration by bond, it was adjudged that the parishioners submitting were answerable for a breach of the award by any of the others. It has also been decided that one may submit in behalf of an infant, and thus make himself liable to perform the award. Hence, though the submission in this case was not binding upon the infants, nor upon the adult

And in a similar case, the bond recited that there were controversies between the plaintiff and the defendant as attorney for D. ; and the condition was, that the defendant should perform the award of arbitrators. In this case also, the submission was held to be binding upon the defendant ; but judgment was given against the plaintiff, because the award directed that the plaintiff should give a release to the use of the defendant, which ought to have been general, or to the use of the principal, according to the submission.^(h)

[*384] *† An agreement was entered into in this form :
Memorandum of agreement made, &c. between
George Herron, on behalf of Edward Barron, of, &c. of

heir who was not a party to it, yet it was valid and obligatory upon all who were parties thereto. If the award had been made in favor of the defendant below, he could have enforced performance against the plaintiffs, as effectually as if all parties in interest had united in the bond." *Smith v. Van Nostrand*, 5 Hill, 419.¶

(h) *Bacon v. Dubary*, 1 Ld. Raym. 246 ; 1 Salk. 70, S. C. † Attorneys are not in general personally liable on engagements entered into by them on behalf of their clients, *Hartop v. Jukes*, 2 M. & S. 438 ; *Hart v. White*, Holt, N. P. C. 76. They may, however, render themselves so by the form of the engagement. Thus, where the solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: " We, as solicitors to the assignees, undertake to pay the landlord his rent ;" it was held, that they were personally bound by this undertaking, *Barrett v. Jones*, 3 B. & A. 47. And again, where the several attorneys for the plaintiff and the defendant, in a cause which stood for trial, entered into an agreement whereby they personally agreed that the record should be withdrawn, and that certain things should be done, by way of settlement of the dispute, by the plaintiff and the defendant, and that costs should be taxed for the defendant in a certain manner ; it was held, that the plaintiff's attorney was bound to pay the costs when taxed accordingly, *Iveson v. Conington*, 1 B. & C. 160.

And if the attorney has given directions for certain business to be done, with the knowledge and consent of his client, it is a question for the jury, whether the business has been done on his credit or on that of the client ; and if found to have been done on the credit of the attorney, he will be personally liable, *Strace v. Whittington*, 2 B. & C. 11 ; and see *Kendray v. Hodgson*, 5 Esp. 228.

the one part, and James Norton, of the other part; viz. first, the said George Herron doth hereby agree to execute unto the said J. N. a lease of, &c. And it was held, that Herron was liable personally for non-execution of the lease.(11)

But the agent is not liable even upon a *written [*385] undertaking formally given, if it appear on the face of it that he was acting as agent, and the principal subsequently annex to the same undertaking his own ratification of it. Thus, where Lavender, an auctioneer, entered into an agreement, as agent for and on the part and behalf of S. R., and signed it, and at the foot were added these words, "I hereby sanction this agreement, and approve of C. Lavender having signed the same on my behalf," it was held that Lavender was not personally responsible.(12)†

Agents may also render themselves personally responsible upon contracts by express warranty of soundness, title, and the like. It is laid down,(i) that if a servant make an express warranty; as if a servant lease land for his master, reserving the rent to his master, and to invite the lessee to take the lease, promise that he shall enjoy it without incumbrance; if the land be incumbered, an action lies against the servant. Upon the sale of goods, a warranty by a known broker, agent, or servant, made pursuant to his authority, will not subject him to answer personally, unless his own responsibility appear by the terms of the warranty to *be pledged, or to [*386] form the consideration of the sale.(k) But if a special agent employed to sell, with orders not to warrant, nevertheless do so, (in which case, it has been seen, the

(11) † *Norton v. Herron*, Ry. & M. 229.†

(12) † *Spittle v. Lavender*, 2 B. & B. 452.†

(i) 1 Roll. Abr. 95, pl. 30. It is said, however, 2 Roll. Rep. 270, that a warranty on sale must be made by him who sells; and therefore if a servant or apprentice, upon sale of goods for his master warrants them, it will be a void warranty; for it is the sale of the master.

(k) 3 T. R. 761; 1 Com. Dig. 240.

warranty would not bind the principal,) the agent will be answerable, otherwise the buyer would be without remedy.^(l)

The cases here considered are independent of the question of deceit in warranting, with a knowledge of default in the thing warranted. The liability of the agent is then founded upon a tort, which is a separate ground of responsibility, to be hereafter considered.

5. In the foregoing cases, agents, acting within the scope of a regular authority, are liable upon such contracts as they make in a representative capacity. But, moreover, if an agent so exceed his authority in the contract made by him, that the principal is not bound by it, he becomes himself liable to the person with whom he deals.^(A) Thus a broker, who was limited by his commission to the purchase of a particular kind of silk, having contracted on behalf of his principal for the purchase of a different kind, it was held, that his principal was not bound by the contract, but that he was himself liable to the sellers for the loss upon the re-sale.^(m)

[*387] *If an agent undertake for his principal to pay a sum of money *without any authority*, he only is liable upon the promise.⁽ⁿ⁾ So if without any authority he borrows money.^(o) (13)

(l) 3 T. R. 761.

(A) || *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Mott v. Hicks*, 1 Cowen, 513; *Stone v. Wood*, 7 Cowen, 453; *Laying v. Stewart*, 1 Watts & Serg. 222; *infra* n. (13.)||

(m) Esp. Ni. Pri. Cas. 111; and see *Beawes*, 43; 3 T. R. 761.

(n) 3 P. Wms. 279.

(o) 1 Eq. Ab. 308.

(13) † Walter accepted a bill drawn on one Hancorne, as per procuration of Hancorne. The bill so accepted was paid away for value, and in the hands of a *bona fide* indorsee was dishonored by the supposed acceptor, Hancorne. An action was thereupon commenced against him upon the bill; on the trial of which, Walter, being called as a witness for the defendant, stated that he had no authority to accept for Hancorne, and the plaintiff (the indorsee) was consequently nonsuited. On this he brought an action against Walter for the amount of the bill and the costs of the former

A scrivener, who had put out at interest the money of his employer, afterwards undertook to compound with the

suit, and declared in case for deceit, the declaration alleging that Walter fraudulently pretended to have authority to accept, whereby the plaintiff, taking the bill on the faith of that assurance, was injured. On this second trial, the jury having found that Walter had acted *bona fide*, and with no intention to defraud, Lord Tenterden directed a verdict for the defendant, considering actual fraud essential to the maintenance of the action, but reserved leave to the plaintiff to enter up a verdict for the amount claimed, if the Court of King's Bench should think otherwise. Accordingly, on argument, it was adjudged that the action well lay, notwithstanding the absence of a fraudulent purpose, and the verdict was entered up for the plaintiff. *Polhill v. Walter*, Hil. Term, 1832, 3 B. & Ad. 114. ¶ If an agent employed to purchase property at auction at a limited price, exceed his authority, he may be considered as purchasing on his own account, and may be sued as a purchaser. *Hampton v. Speckanagle*, 9 Serg. & Rawle, 212. The defendant, a clerk of a mercantile firm, consisting of Gideon Stephens and three of his sons, who ordinarily transacted their business under the name of *G. Stephens & Sons*, having authority to make notes in behalf of the firm, but not in behalf of Gideon Stephens individually, made a note to the plaintiff upon a co-partnership transaction, and signed the name *G. Stephens*, adding his own initials; it was held that the defendant was himself liable on the note, unless it were shown that the firm was bound in consequence of having adopted the name of *G. Stephens* as a proper name to designate such firm in the transaction of the business. Beardsley, J. delivering the opinion of the court said: "The name *G. Stephens* was written by the defendant, and he undoubtedly intended to bind some person or persons by that signature. If no one else was bound, as the plaintiff insists was the fact, the defendant was clearly liable; for if one, assuming to be agent of another person, executes a note in his name, having in truth no authority for that purpose, the assumed agent is himself bound by the signature. In England a doubt has been expressed whether the assumed agent would be holden as a party to the paper, unless his name appears on it, although an action on the case would lie against him. But this distinction need not be considered, for here the defendant's initials, which for this purpose are equivalent to his name, are on this paper. To exempt the assumed agent from personal liability on the ground stated, it must appear that he was agent at the time he signed the note or other obligation. A subsequent ratification of his act would not affect the question. Upon this part of the case it was a simple question of fact, whether the defendant signed the name *G. Stephens* to the note under competent authority, so that some other person than the defendant was bound thereby.—It seems hardly to have been pretended on the trial, and certainly was not on the argument, that this was the note of Gideon Stephens alone. The ground

borrower for 10s. in the pound. The latter, being afterwards compelled by the original creditor to pay the remainder, obtained a decree against the scrivener to be indemnified according to the agreement.^(p) So if a
 [*388] special agent warrant goods without authority, he only is liable to the buyer.

6. It has been said, that by the general rule of law, agents properly authorized, contracting for a known responsible principal, without any personal undertaking, are not liable individually. But an exception is to be made in the case of masters of ships, who, though known to contract for the owners of the ship, and not for themselves, are nevertheless, as it is now settled, liable for the contracts

assumed was, that it was the note of the firm, and bound all its members. It was clearly competent to show that the persons composing the firm of *G. Stephens & Sons*, had adopted and used the name of *G. Stephens*, without any addition thereto; for in that event they might have been bound by it, as they would be by the use of the ordinary name of their firm. The defendant appears to have had authority to make notes for the firm, and consequently to do so in any name they might use for that purpose. If therefore *G. Stephens* had been assented to and used by the members of the firm, as a proper name to designate themselves in transacting their business, and was used for that purpose by the defendant in this instance, he was clearly not liable for having signed the name *G. Stephens* to the note without competent authority. But it was material to show the concurrence of all the members of the firm in the use of this new name to designate and bind themselves.—The judge was requested to charge that the jury must find the note to have been executed in the name of the firm, or in other words, that it was the note of the firm, before a verdict could be rendered for the defendant. This charge the judge refused to give, and in this I think he erred. The note was confessedly not the note of *G. Stephens* alone; and unless the firm were bound by it, which could only be effected by the use of their name, the defendant was clearly liable for having transcended his authority. The true import of the charge may have been misapprehended; but as I understand it, the jury were at liberty to find that this was not the note of any person. It comes to this conclusion at last; but surely such a principle cannot be upheld. If it was not the note of the party whose name had been placed to it by another person, it was the note of the person who assumed to act as agent." *Palmer v. Stephens*, 1 Denio, 472, 480, et seq.||

(p) 2 Vern. 127; Eq. Ca. Ab. 25.

they make for repairs, &c. unless they take care to avoid that responsibility by the express terms of the contract.(q)

7. Another case in which agents are personally responsible is, where money has been paid to them for the use of their principal, under such circumstances that the party paying it might recover it back from the latter. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal *fresh credit* upon the faith of it, it may be recovered from the agent.(r) For the payer has his option, either to consider the payment as made to the principal, or may charge the agent *himself who holds it for his [*389] use.(s) Nor is it sufficient that the agent has passed the sums received to the principal's account, giving him credit for it as paid in discharge of a debt due to himself.(t)

(q) *Rich v. Coe*, Cowp. 36. || *Leonard v. Huntington*, 15 Johns. Rep. 298; *Marquand v. Webb*, 16 Johns. Rep. 89; *James v. Bizby*, 11 Mass. Rep. 34; 3 Kent's Comm. 161. The liability of the master does not exonerate the owner. The party furnishing repairs &c. for a ship, has, in a case where no particular circumstances intervene by which the right to recover is limited to the party to whom credit was given, his twofold remedy, against the owner and the master. (*Supra.*) As to the remedy, *in rem*, to be enforced by proceedings in the admiralty, *that* has no connection with the subject of this work. || † But if the repairs were done under circumstances which show that credit was given to the owners and not to the master, the latter will not be liable. *Hoskins v. Slayton*, Ca. temp. Hardw. 376. ‡ || So, *e converso*, if the credit were given to the master and not to the owners, the master alone would be liable, Cases cited *supra*; *Thorn v. Hicks*, 7 Cow., 697. ||

(r) *Buller v. Harrison*, Cowp. 565. *Cox v. Prentice*, 3 Maule & Selw. 344.

(s) *Carey v. Webster*, Str. 480.

(t) *Buller v. Harrison*, Cowp. 565. *Cox v. Prentice*, 3 Maule & Selw. 344. || As to the principles stated in the above paragraph, see further, *Hearsey v. Pruyn*, 7 Johns. Rep. 179; *Frye v. Lockwood*, 4 Cowen, 454; *LaFarge v. Kneeland*, 7 Cowen, 456; *Mowatt v. McLellan*, 1 Wend. 173; *Carew v. Otis*, 1 Johns. Rep. 418. An action may be maintained against an agent who has received money to which his principal has no right, if the agent has had notice not to pay the money over; and in some

It seems, however, that the right to recover against the agent is to be understood with some qualification. For it

cases without such notice, if the money has not been actually paid over. *Hearsey v. Pruyn*, ubi sup. The defendants in an execution paid to the agents of the plaintiff the amount of the debt, and gave a verbal notice that it was their intention to sue out a writ of error to reverse the judgment. This was afterwards done, and the judgment was reversed. The agents of the plaintiff paid over to him forthwith, the amount received, and the defendants instituted a suit against the agents to recover the sum paid to them. It was held that they could not recover. Thompson, J. delivering the opinion of the court said: "The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity; and if no legal right existed when the money was paid, to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money, does not, even in such cases create the right to recover it back; that results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake. *The Bank of the United States v. The Bank of Washington*, 6 Peters, 8, 18. In *Elliott v. Swartwout*, 10 Peters, 137, 155, 158, Thompson, J. referring to *Buller v. Harrison*, ubi sup. and other cases, says: "Here then is the true distinction; when the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if before paying it over, he is apprized of the mistake, and required not to pay it over, he is personally responsible." And again: "From this view of the cases it may be assumed as the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal if he has had notice not to pay it over." In this case (which is also cited, ante, p. 377, n. (t) for another purpose,) it was held that a collector of the revenue is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid over in the regular and ordinary course of his duty into the treasury of the United States, he the collector, acting in good faith, and under instructions from the treasury department, a notice having been given him at the time of payment, that the duties

has been held that an action will not lie against a mere collector or receiver, for the purpose of trying a right in

were charged too high, and that the party paying, so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid; and a notice not to pay over the amount into the treasury. And see *Bend v. Hoyt*, 13 Peters, 263.

But where the payment is compulsory, and it is not made expressly for the use of the principal, the party paying may recover it back in an action against the agent without giving him notice not to pay it over.—A Spanish ship bound from Havana to London, having met with a violent gale of wind, put into the port of New York, and was entered at the custom house as a ship in *distress*, having conformed to the regulations of the act of Congress (5 Cong. Sess. 3, c. 128,) in such cases. She was condemned after a regular survey, by the wardens of the port, as unfit to be repaired; and under their direction was sold at public auction, and purchased by the plaintiffs, American citizens, who, at their own expense, afterwards repaired her, and fitted her out for a voyage to Cadiz; but the defendant, the collector of the customs for the port of New York, refused to give her a clearance, unless the new owners would first pay the tonnage duty, or light money, of fifty cents per ton, imposed on all *foreign* ships entering the ports of the United States. They objected to the demand as illegal, but paid it; and afterwards brought an action of *assumpsit* against the collector to recover back the money so paid. A few days before it was paid, and before the suit was commenced, the collector paid the money into the Branch Bank of the United States, to the credit of the Treasurer of the United States; and no request was made, or notice given by the plaintiffs, at any time, to the collector, or other officer of the customs, not to pay over the money, nor to pass it to the credit of the United States. It was held, under the construction of the act of Congress, that the money was illegally demanded, and the plaintiffs were entitled to recover it back from the collector. *Per Curiam*. “The tonnage or light money was wrongfully demanded of the plaintiffs as a condition of the clearance, and that being established they are entitled to recover it back in this action, without showing any notice to the defendant not to pay the money into the public treasury. The cases which exempt the agent from the suit, if he has in the meantime paid over the money to his principal without notice, do not apply. Here is no person but the defendant against whom the suit could in any event be brought, and the money was paid by compulsion. It was extorted as a condition of granting the clearance, and not paid with the intent or purpose that the collector should pass it to the credit of the United States. The case of *Snowden v. Davis*, [post, 390 n. (14,)] lays down this just distinction, that notice to the agent is not requisite in the case of a compulsory payment, and one not made expressly for the use of the principal. The plaintiffs are accordingly entitled to judgment.”

the principal, even though he have not paid over the money. It is said, in one case,^(u) that if the defendant can show the least color of right in his principal it is sufficient. And Lord C. J. Lee declared, that the right to an inheritance should not be tried in an action for money had and received brought against the receiver.^(w) In a case where the question was much considered, it was held that an action could not be supported against a steward for quit-rent *voluntarily* paid, in order to bring the lord's right in question, but that it must be against the lord.^(x)

[*390] *8. In general, if the agent have paid over the money to his principal, (except in some instances, afterwards noticed, where the authority is wholly void,) the remedy is against the latter only.^(y) For, it is said by Lord Mansfield, the law is clear that if an agent pay over money which has been paid him by mistake, he does no wrong, and the plaintiff must call on the principal.^(z)(14)

Ripley v. Gelston, 9 Johns. Rep. 201 ; and see *Clinton v. Strong*, Id. 369 ; *Frye v. Lockwood*, 4 Cowen, 456. ||

(u) *Staplefield v. Yewd*, Bull. Ni. Pr. 133.

(w) *Staplefield v. Yewd*, cited 4 Burr. 1985.

(x) *Sadler v. Evans*, 4 Burr. 1984 ; and see post, note (b). It is said by Lord Kenyon, 4 T. R. 555, to have been decided by this case, that an action for money had and received will not lie against any known agent ; but that the party must resort to the superior. But the principles of the case do not appear by the report to be so extensive ; and the general doctrine appears to be contradicted by the cases above referred to. Though the opinion of Mr. Baron Perrot at the trial of the case of *Sadler v. Evans*, viz. that if the action were maintainable or not according as the fact of the money being paid over should appear at the trial, this kind of action would be a trap for the plaintiff, appears to apply to the action in every case where it is brought against a known agent. || Where one man receives money which ought to be paid to another or belongs to another, an action for money had and received, will lie in favor of him to whom of right the money belongs ; and this, notwithstanding it may involve the title of an office, if the party has once been in possession. *Allen v. McKeen*, 1 Sumn. 278, 317. ||

(y) 1 Str. 480. || Ante, 389, n. (t.) ||

(z) Cowp. 568 ; *Horsfall v. Handley*, 8 Taunt. 136.

(14) [But an agent cannot defend himself on the ground of having paid

And it has been held sufficient in an answer to a bill in chancery for the defendant to swear that he received

over the money, unless it appear that the money was paid to the agent *for the purpose of paying it to the principal* (as was the case of *Sadler v. Evans*, where the money was paid to the agent of Lady Windsor for Lady Windsor's use;) for it was holden that one who had paid a sum of money to a bailiff, exceeding his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should be delivered over to any one in particular, might maintain an action for money had and received against the bailiff, although he had, in fact, paid the money over to the sheriff, and the sheriff to the exchequer. *Snowdon v. Davis*, 1 Taunt. 359] || *Ripley v. Gelston*, ante, 389, n. (t.) The defendant an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property; the defendant sold, and paid the proceeds to C.'s order: C. having shortly afterwards been declared insolvent, it was held that the defendant was not liable to C.'s assignee, although he was aware, when he sold the property, of C.'s embarrassment. *White v. Bartlett*, 9 Bing. 378. If an auctioneer pay to his employer the proceeds of goods sold, without notice that a third person claims property in them, he is not afterwards liable to such third person, though the real owner of the goods. *Jacobs' case*, 2 Bay's (So. Car.) Rep. 84.

C. the plaintiff and D. claimed moneys in the hands of O., the defendant, C. brought a suit against O., who defended it at the request of D. The attorney of C. entered into a compromise with the attorney of D. & O., and the suit was discontinued; after which O. paid over the money in his hands to D. C. afterwards finding a defect in the securities delivered to him as part of the conditions of the compromise, brought the present action against O. for a breach of his promise that the securities were valid. It was held, that O., having paid over the money to his principal was no longer liable. Thompson, J. delivering the opinion of the court said: "The facts stated in this case are not sufficient to sustain the present action. The defendant was a mere stakeholder of the money which was the subject of the former suit. The plaintiff, who had an interest in the money, settled the dispute with respect to its disposition; this was done without the agency or interference of the defendant; and on such compromise he paid over the money, according to the terms of the settlement, which must be considered as done pursuant to the direction and orders of the parties interested in it, and as equivalent to a payment to themselves. The defendant having had no agency in the compromise, it is perfectly immaterial as it respects his liability, whether or not the plaintiff was defrauded or deceived in that settlement. No notice was given to the defendant of the pretended alteration of the notes, until after he had paid over the money; and it would be unjust in the extreme to make him responsible for the negligence of the plaintiff, or the misrepresentations of L. with whom he made the settle-

[*391] the sums to be accounted for as a *servant, and had paid them over, or laid them out, by order of his master.(a)

So one who had erroneously paid a sum by way of duty to a revenue officer failed in an action against the officer, upon proof by the latter that he had paid the money over to his superior.(b)

Thus also where A. had paid money to B. to be paid to C. as a consideration for C.'s signing a bankrupt's certifi-

ment. If L. could be considered the agent of the defendant, the subsequent conduct of the latter, in paying over the money pursuant to the compromise, might be deemed a ratification, and make him responsible for the fulfilment of the contract; but every part of the case excludes the idea of the defendant's having had any interest in the controversy. He was not only in fact a mere nominal party, but this was known to and well understood by the plaintiff. The case states explicitly, that the first suit which was the subject of the settlement, was defended at the instance and for the benefit of D. and others, and that this was known to the plaintiff. L. acted as the known and avowed agent of D. and others. The plaintiff contracted with him in that capacity; and if the contract has not been complied with, a remedy must be sought either against the principals or their agents, and not against one who had no concern in the transaction." *Carew v. Otis*, 1 Johns. Rep. 418. On the sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney, subscribing himself as "agent for the said S. S.," the vendor. The purchaser paid his deposit to the attorney, who gave a receipt signed by himself as "agent for S. S." The sale going off through the vendor's default in not making a perfect title, and the deposit money not being returned, it was held, that the purchaser could not bring an action for money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor. *Bamford v. Shuttleworth*, 11 Ad. & Ell. 926.||

(a) 1 Vern. 136, 208.

(b) *Greenway v. Hurd*, 4 T. R. 553; || ante, 389, n. (t).|| It may be questioned whether this action could have been supported, even if the money had not been paid over. For Lord Kenyon puts this upon the same footing as the case of *Sadler v. Evans*, 4 Burr. 1984, ante; || 389, n. (x); 390, n. (14);|| and in *Whitbread v. Brookshank*, Cowp. 69, it was said by the court, that an action for money had and received will not lie against an excise officer for an over-payment. † But see *Snowdon v. Davis*, supra; || 390, n. (14).||

cate; in an action brought by A. against B. to recover back the money, the plaintiff was nonsuited, upon proof that the defendant had applied the money according to the purpose intended.(c)

But if an agent be put in the condition of a *stakeholder*, he is bound to keep the deposit till the conditions are fulfilled upon which it is to be paid: and therefore payment over is no defence, if such payment were premature.(A)

This is the case with auctioneers, who ought to retain the deposit money till the title is made out; and upon

*failure of the vendor to make out a title, it may [*392] be recovered from the auctioneer, though he have

paid it over.(d)(15) And a payment over, after *notice* to withhold the money, will not protect the agent in those cases where he would be liable if it were in his hands: for if after notice he choose to make himself judge between the parties, he then stands in the condition of a principal.(e)

To make the fact of payment over to the principal available as a defence to the agent, the payment must be to the real principal, and not to a person falsely assuming that character. Thus, if an attorney bring an action, and re-

(c) *Smith v. Bromley*, Dougl. 696.

(A) || *Carew v. Otis*, 9 Johns. Rep. 418; *Bamford v. Shuttleworth*, 11 Ad. & Ellis, 926; ante, 390, n. (14).||

(d) 5 Burr. 2639.

(15) [Where a person, who acted in the twofold character of attorney and auctioneer for the vendors, paid over the deposit to his employers, with a knowledge that the title was disputable, he was held liable, on the vendors not making out a good title to the purchaser, in an action for money had and received, brought to recover back the deposit, the money having been paid in his own wrong. *Edwards v. Hodding*, 1 Marsh. 377; 5 Taunt. 815, S. C.]

(e) || Ante, 389, n. (t).|| An auctioneer who sold goods, after notice that they were not the property of his employer, was held liable to pay the money for which they had sold. In which case it was laid down, that though in general the title of the principal cannot be tried in an action against the agent, yet by persisting after notice the auctioneer had made himself *quasi* a principal. *Hardacre v. Stewart*, 5 Esp. Cas. 103. || Ante, 390, n. (14).||

cover a sum of money on the retainer of a person pretending to act under a forged power of attorney from the party really entitled, and pay over the money [*393] *recovered to the person thus employing him, he is liable to refund to the party who paid the money under that process, and who may afterwards be called upon and obliged to pay it over again to the true creditor.(f) But an agent, employed to collect the debts of a testator by one who had been appointed administrator before the will was found, has been held not liable to the executor for sums so received by him, and *paid over* to the administrator.(g)

An exception to the rule that an agent is not liable after payment over is found in the following case. A jailer claimed to retain out of a sum which he owed to one who had been his prisoner, the sum of a guinea per week as the rent of a room which the plaintiff had been permitted to occupy during his imprisonment. The jailer had no authority to make such a bargain, though he accounted with the county for the guinea a week. Lord Kenyon said, "I think this action may be maintained. I am aware [*394] that it has been holden *in the case of *Sadler v. Evans*, (4 Burr. 1984,) that an action cannot be brought against an agent for money received to the use of his principal; but in that case there was nothing corrupt in the foundation. This agreement is one of those which the law will not allow. Besides, the county cannot be sued. Therefore I am of opinion that the plaintiff, not-

(f) 1 T. R. 60.

(g) *Pond v. Underwood*, 2 Ld. Raym. 1210. See *Jacob v. Allen*, 1 Salk. 27, contra. But this last case was disapproved by Lord Mansfield, 4 Burr. 1984, who assented to the authority of *Pond v. Underwood*. And see *Allen v. Dundas*, 3 T. R. 125, payment to one having probate of a forged will is good; for the authority of a court having competent jurisdiction is valid till revoked; but *aliter* if the supposed testator be living at the time of probate, for then the court has no jurisdiction. Vide also 1 Ld. Raym. 762; † and this seems to be the better law.†

withstanding this money has been paid over to the county, is entitled to recover.(h)

An agent who has received money from his principal to pay to a third person, is liable to the latter in an action for money had and received, or of debt.(i) But if money be paid by the acceptor of a bill of exchange to an agent for the purpose of taking it up, the agent, in an action brought against him by the holder, may avail himself of the same defence which the acceptor could have done, as that the holder received the bill by indorsement of the drawer after an act of bankruptcy committed by him.(k)

[In order to render the agent liable to a third person, there must be a specific appropriation of the money to the use of such third person † assented to by the agent.†

For although bills *be remitted to an agent, ac- [*395] companied by directions to pay the amount in certain specified proportions to the creditors of the remitter ; yet if the agent, on the application of a creditor, refuse to hold the bills for the purposes directed, he is not liable (after having thus repudiated the agency) to a creditor for the amount of his debt, because there is no privity either express or implied between them ; and by the mere act of receiving the bills, the agent only agrees to hold them until paid, and their contents, when paid, for the use of the remitter.(16) So, although money be remitted by the acceptor of a bill to his agent for the purpose of taking up the bill, and the agent, on application, finds that the bill has been returned to his correspondent as dishonored, it is afterwards competent to the remitter to recal the money, and to make a new appropriation of it ; and the agent,

(h) *Miller v. Aris*, 1 Selwyn, Ni. Pri. 103. See also *Townson v. Wilson*, 1 Camp. N. P. Cas. 396 ; † and *Watkins v. Hewlett*, 1 B. & B. 1.†

(i) 2 Rol. Rep. 441.

(k) *Redshaw v. Jackson*, 1 Camp. N. P. C. 372.

(16) [*Williams v. Everett*, 14 East, 582. See also *Grant v. Austin*, 3 Price, 58 ;] † *Yates v. Bell*, 2 B. & A. 643 ; *Scott v. Porcher*, 3 Meriv. 652 ; and *Wedlake v. Hurley, Lloyd & Welsby*, 330.†

upon the bills being reprocured and tendered to him for payment, is not liable, since this was not such a specific appropriation of the money as to render the agent a trustee for the holder of the bill.(17)]

(17) [*Stewart v. Fry*, 7 Taunt. 339 ;] † and see *Gibson v. Minet*, 2 Bingh. 7, that if after countermand the agent pay the money over, he is liable to his principal.‡

¶ How far an agent is personally liable to a third party for matters arising after the determination of his agency, was fully considered in the following case.—A man who had been in the habit of dealing with the plaintiff for meat supplied to his house went abroad, leaving his wife and family resident in this country, and died abroad : It was held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received ; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it ; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties. Alderson, B. delivering the judgment of the court said : “ The point how far an agent is personally liable who having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent, who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge ; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guarantying the consequences arising from any want of such authority. But there is a third class in which the courts have held, that when the party making the contract *bona fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases it is true, the agent is not actuated by any fraudulent motives ; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds, that the statement will ultimately turn out to be correct.

*SECTION 2.

[*396]

Liability of Agents for their own tortious Acts.

In considering how far agents are liable individually to third persons for *wrongs* done in the course of their em-

And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or the other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knows to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act. Of the first it is not necessary to cite any instance. *Polhill v. Walter*, [ante, 387, n. 13,] is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part—no want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation was by the act of God. The continuance of the life of the principal was, under these circumstances a fact equally within the knowledge of both contracting parties. If then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument pressed with the difficulty, that if the defendant be not personally liable, there is no one liable on this contract at all. This may be so: but we do not think that if it be so, it affords to us a sufficient ground for holding the defendant liable.—Our judgment on the present occasion is founded on general principles applicable to all agents; but we think it right also to advert to the circum-

ployment, it is necessary to resort to general rules derived from the law of masters and servants ; though it is not proposed in this treatise to enter particularly into that subject.

1. Servants are responsible for tortious acts, whether done by authority of their masters or not.(a) But for mere non-feazance or non-performance of a duty, servants are not liable to third persons, but only to their masters. For there is no privity of consideration between the servant and the person who employs his master ; and non-feazance alone will not support an action without consideration,(b) though misfeazance will. We find the principle thus stated by Lord C. J. Holt : " A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it : but for a misfeazance an action will lie against a servant or deputy, but not as a deputy or servant,

stance, that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent, contracts with one capable of contracting in his own name ; but he who contracts with a married woman knows that she is in general incapable of making any contract by which she is personally bound. The contract therefore made with the husband by her instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now if a contract were made on the terms, that the agent, having a determinable authority, bound his principal, but expressly stipulated that he should not be personally liable himself, it seems quite reasonable that in the absence of all *mala fides* on the part of the agent, no responsibility should rest upon him ; and as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself ; and on this limited ground therefore, we think she would not be liable under such circumstances as these." *Smout v. Ilbery*, 10 Mees. & Wels. 1, 8. et seq. Where a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad ; it was held that the woman might have the same authority to bind him by her contracts for necessities, as if she had been his wife ; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received. *Blades v. Free*, 9 Barn. & Cress. 167.||

(a) Post, || 399.||

(b) Ante, || 6, 19, 76.||

but as a wrongdoer.”(c) This doctrine has been repeated and ratified in a subsequent case.(d)

Thus if A. deliver a horse to a smith to shoe, *and he deliver him to another smith who pricks [*397] him, A. may have an action on the case against the latter, though he did not deliver the horse to him.(e) So if one deliver goods to A. to keep, who delivers them to B. to keep to the use of A., and B. waste them, the owner may have an action on the case against B.(f)

*2 The case of masters of ships who, though in [*398] some respects the servants of the ship owners, are held liable to the owners of the goods put on board for

(c) 12 Mod. 488.

(d) Sayer, 41. It is said by Lord C. J. Holt, 12 Mod. 488, that “if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner to escape by neglect, the sheriff shall be charged and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer or rescuer.” In *Bell v. Catesbie*, Roll. Abr. 94, pl. 5, it was resolved, that if an underbailiff of a liberty levy a debt by virtue of a warrant of *fieri facias*, and then conceal the writ, and make no certificate, an action on the case lies against him; for this reason, that he has done a personal tort, Vid. 1 Vin. Ab. 573. In *Marsh and Astrey's case*, 1 Leon. 146, an undersheriff was held liable for returning a tenant summoned when he was not, upon the ground that this was a positive act, and not a mere negligence. And see Dr. and St. c. 42, p. 280. However in *Cameron v. Reynolds*, Cowp. 403, it was held, that an action did not lie against an undersheriff for refusing to execute a bill of sale to plaintiff under a *fieri facias*. And Lord Mansfield said, “It is an action for a breach of duty in the office of sheriff. Wherever that is the case, the action must be against the high sheriff: and if it proceed from the default of the undersheriff, or bailiff, that is a matter between them and the high sheriff.”(1) || And see ante, 300, n. (o); *Bradley v. Carr*, 3 Mann. & Gran. 221.||

(e) Roll. Abr. 90. It is said, 1 Black. Com. 430, if a smith's servant lame a horse while he is shoeing him, an action lies against the master, and not against the servant. *Quære* the latter part of the proposition, if the injury arise from actual misfeasance.

(f) Roll. Abr. 90.

(1) There is no contradiction between the two cases.—The one was an action for doing something which he ought not to have done; the other for not doing something which he ought to have done.

negligence, rather admits than contradicts the principle of this rule. For in the case which decided that point, (g) to the objection that the master was but a servant to the owner it was answered, that the law takes notice of him as more than a servant ; he may impawn the ship, and sell *bona peritura* : he is rather an officer than a servant. (h)

3. Servants are bound to obey only the lawful commands of their masters ; and it is laid down as a rule, that in every case where the master has not power to do a
[*399] thing, whoever does it by *his commandment is a trespasser as well as the master. (i)

An agent, like any other servant, is personally liable for any tortious act committed by him in the course of his em-

(g) *Morse v. Slue*, 1 Vent. 238.

(h) Other cases may be adduced to show that a deputy, though he be nominally the servant of another, yet if he be really a distinct officer, is liable for negligence in his office as much as if he were to all intents the principal. || *Adsit v. Brady*, 4 Hill, 630 ; *Bradley v. Carr*, 3 Mann. & Gran. 221. || The case of *Rowning v. Goodchild*, 3 Wils. 454 ; 5 Burr. 2721, was an action against the deputy post-master of *Ipswich*, for negligence in not delivering a letter. One objection made for the defendant was that he was only a deputy, and that the action should have been against the postmaster-general. 3 Wils. 451, 454. But the court (admitting as it seems, the general principle upon which the objection was founded) held the action maintainable, "for the deputy postmasters are subsisting substantial officers, and answerable for their own misfeasances and nonfeasances. They have original offices under the postmaster-general." It seems to be upon this principle that it is laid down by the court, 1 Vent. 238, that the jailer may be charged for an escape, though the sheriff be also liable ; but the turnkey cannot, for he is a mere servant.

(i) 8 E. 4. 45, per Choke. In *Michael v. Alestree*, 2 Lev. 172, a servant was held to be jointly liable with the master in an action of trespass for an injury done by training unruly horses in a public place ; and see *Wyne v. Ryder*, 2 Mod. 67. In 22 E. 4, 45, it is said, per Jenny, if a master lock a man into his house and deliver the key to his servant, if the servant be ignorant that any body be there, he is not chargeable ; but if he know that the master had imprisoned one tortiously, and he still kept him in prison, he is liable to an action. However, a mere servant is said not to be liable to an action for a fraud in his master's business. Thus it is laid down, Roll. Abr. 95, that if the servant of a taverner sell wine that is corrupted, knowing it to be so, no action of deceit lies against the servant, for he did it but as a servant.

ployment ;(k) and is liable for an actual misfeasance, notwithstanding that it was committed in submission to the authority of his employer. In an action of trover a special verdict was found in substance as follows : viz. that one H. was possessed of the goods in question, and became a bankrupt ; that the plaintiff was chosen assignee ; and that the defendant as servant and clerk to one G., a creditor of the bankrupt, applied to the bankrupt, after the act of bankruptcy, for payment of the debt ; when the bankrupt delivered the goods in question to the defendant, who gave a receipt for them in the name of his master, and sold them for his master's *use. The question was, [*400] whether the action could be maintained against the servant, who acted wholly for his master, and by his authority. The Court of King's Bench were unanimously of opinion that it was well brought ; and Lord C. J. Lee said, "The point is, whether this defendant is not a wrongdoer ; for if he be so, no authority that he can derive from his master can excuse him from being liable in this action.(l)

(k) 12 Mod. 448.

(l) 1 Wils. 328. *Perkins v. Smith*, Say. 41, S. C. In the case of *Mires v. Solebay*, 2 Mod. 242, which does not appear by the reports to have been noticed in *Perkins v. Smith*, it is said to have been expressly decided, that *trover* would not lie against a servant for an unlawful intermeddling with the goods of another by command of his master, unless it amount to a trespass ; and then it was agreed an action of trespass would lie against him. But this doctrine is not only contradicted by *Perkins v. Smith*, but is in opposition to what is elsewhere laid down, viz. "that any disposing of another's property, without his authority, is a conversion." 6 Mod. 212 ; 6 East, 540. There were likewise other grounds upon which the judgment might have proceeded, viz. that the taking the cattle, which was the ground of the action, was under a replevin ; and also that the special verdict did not expressly find a conversion. Accordingly, [in the case of *Stephens v. Elwall*, 4 Mawle & Selw. 259, it was decided, that a servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.] †. But a mere refusal by a servant to deliver goods, the property of the party requiring them, will not be such a conversion as will render the servant liable, if the refusal be qualified by a declaration that he cannot deliver them without the authority of his master. *Alexander v. Southey*, 5 B. & A. 247. ‡ "The refusal of a servant to deliver goods intrusted to him by his employer, on a demand made by a stranger, is not

But a broker who sells goods after a sale by the principal, though it be held that the principal's sale super-
 [*401] sedes his, yet is not liable in trover for *detaining the goods without notice of the sale, for there is no conversion.(*m*) There are, however, cases in which the employer alone, and not the agent, may be liable for a wrong done. As if an attorney, by direction of his client, bring an action, however groundless or vexatious it may be, he is not liable.(*n*) Even if he sue for a debt which he knows to be released, and was himself witness to the release, yet it has been held that no action lies against him.(*o*) But though an attorney be not answerable for bringing a groundless action, yet he is responsible for mistakes in the conduct of it which produce a damage to the defendant. Where an attorney, employed to sue an administratrix upon a bond of the intestate, after judgment in the common form, arrested her on a *capias ad satisfaciendum*, sued out against her personally, (without suggesting a *devasta-*

sufficient evidence of a conversion in an action against the servant. Nor is a demand of the servant sufficient to charge the master, unless the former acted under the direction of the latter in refusing to deliver the goods. The demand made of J. and his refusal to deliver the property because he had no authority to do so, was neither sufficient to charge him, nor his employer M.; and there was no other demand before suit brought.—Now what was the supposed adoption or ratification of J.'s refusal to deliver the property? M. said in substance, that J. had done right in not delivering up the property, because he had no authority to do so. This was saying no more than the law says, and proves nothing in favor of the action. If a man without my license or command commit a trespass for my use or benefit, subsequent assent will make the act my own, and I may be treated as a wrongdoer. But if my servant properly refuse to do an act because he has no authority, and I afterwards approve of his conduct for that reason, it is no wrong, and an action cannot be based upon it." *Bronson, J. Mount v. Derick*, 5 Hill, 455.||

(*m*) *Alwin v. Taylor*, Aleyn, 93.

(*n*) *Per De Grey*, C. J. 2 Bl. Rep. 867.

(*o*) *Anon.* 1 Mod. 210, per *totam curiam*; and see 1 Roll. Rep. 408; 2 Keb. 88. This case is referred to as law by Blackstone, J. in his report of the case of *Barker v. Braham*, 2 Bl. Rep. 869. || The case is referred to in *Bac. Abr. Master and Servant L*, but the editor, Gwyllim, adds—" *Sed qu.*" 6 *Bac. Abr.* (Bouvier's ed.) 542.||

vit,) he was adjudged to be liable in an action of trespass and false imprisonment. Though the officer executing the writ might have justified under it.(*p*) And *though the principal who commands, as well as [*402] the agent who executes an unlawful act, be liable for it to the party injured, yet if the latter, in the execution of a lawful command, be guilty of an excess above his authority, he only is answerable for the consequences.(*q*)

4. No action lies against a manager, steward, or agent, for the negligence of those whom he has retained for the service of his principal ; nor is a servant who hires laborers for his master liable for their acts. In these cases the action must be brought either against the hand committing the injury, or against the principal for whom the act is done ;(*r*) unless the intermediate agent particularly order those acts to be done from whence the damage ensues.(*s*)

(*p*) *Barker v. Braham*, 2 Bl. Rep. 867. So if an attorney sue in an inferior court, knowing that the cause of action is out of its jurisdiction, he is answerable ; *Goodwin v. Gibbons*, 4 Burr. 2108. † And see *Bates v. Pilling*, 6 B. & C. 38, ante.‡ || 306, n. (*f*).||

(*q*) Skinn. 228, pl. 7 ; Bac. Ab. tit. Master and Servant, L. ; Noy's Maxims, c. 44. See also 9 Co. 76, (*a*). Two cases are mentioned in which a servant is liable, and not the master, for acts done by command of the former ; viz. if a lord command a servant to beat his villein, or a bailiff to distrain his tenant's cattle without cause, the villein or tenant, by reason of the respect and duty which belong to the lord, shall not have an action of trespass, *vi et armis*, against the lord, but he may against the servant or bailiff.

(*r*) *Stone v. Cartwright*, 6 T. R. 411 ; and see *Bush v. Steinman*, 1 Bos. & Pull. 404, ante, p. 296.

(*s*) Per Mr. Justice Lawrence, 6 T. R. 413.

APPENDIX.

No. I.

6 GEORGE IV. CAP. 94.

COMMONLY CALLED THE FACTOR'S ACT.

An Act to alter and amend an Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents. [5th July, 1825.]

WHEREAS an act passed in the fourth year of the reign of his present Majesty, intituled "An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents: And whereas it is expedient to alter and amend the said act, and to make further Provisions in relation to such Contract or Agreements, as hereinafter provided : " Be it therefore enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, any person or persons intrusted, for the purpose of consignment or of sale, with any goods, wares or merchandize, and who shall have shipped such goods, wares or merchandize in his, her or their own name or names, and any person or persons in whose name or names any goods, wares or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares and merchandize to a lien thereon, in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares or merchandize shall be shipped, or in respect of any money or negotiable security or securities received by him, her or them, to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares and merchandize: Provided such consignee or consignees shall not have notice by the bill of lading for the delivery of such goods, wares or merchandize or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or

persons so shipping in his, her or their own name or names, or in whose name or names any goods, wares or merchandize shall be shipped by any person or persons, is or are not the actual and *bona fide* owner or owners, proprietor or proprietors of such goods, wares and merchandize so shipped as aforesaid, any law, usage or custom to the contrary thereof in any wise notwithstanding: Provided also, that the person or persons in whose name or names any such goods, wares or merchandize are so shipped as aforesaid shall be taken, for the purposes, of this act, to have been intrusted therewith for the purpose of consignment or of sale, unless the contrary thereof shall be made to appear by bill of discovery or otherwise, or be made to appear, or be shown in evidence by any person disputing such fact.

II. And be it further enacted, That from and after the first day of October one thousand eight hundred and twenty-six, any person or persons intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keepers' certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be for the true owner or owners of the goods, wares and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares and merchandize, or any part thereof, or for the deposit or pledge thereof or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents or either of them: Provided such person or persons, body or bodies politic or corporate, shall not have notice by such documents or either of them or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and *bona fide* owner or owners, proprietor or proprietors of such goods, wares or merchandize so sold or deposited or pledged as aforesaid; any law, usage or custom to the contrary thereof in any wise notwithstanding.

III. Provided always, and be it further enacted, That in case any person or persons, body or bodies politic or corporate, shall, after the passing of this act, accept and take any such goods, wares or merchandize in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, body or bodies politic or corporate, before the time of such deposit or pledge, then and in that case such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares or merchandize in deposit or pledge, shall acquire no further or other right, title or interest in or upon, or to the said goods, wares or merchandize, or any such document as aforesaid, than was possessed, or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid, at the time of such deposit or pledge as a se-

curity as last aforesaid ; but such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares or merchandize in deposit or pledge, shall and may acquire, possess and enforce such right, title or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid ; any rule of law, usage or custom to the contrary notwithstanding.

IV. And be it further enacted, That from and after the first day of October one thousand eight hundred and twenty-six, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to contract with any agent or agents, intrusted with any goods, wares or merchandize, or to whom the same may be consigned, for the purchase of any such goods, wares or merchandize, and to receive the same of and pay for the same to such agent or agents ; and such contract and payment shall be binding upon and good against the owner of such goods, wares and merchandize, notwithstanding such person or persons, body or bodies politic or corporate, shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents : Provided such contract and payment be made in the usual and ordinary course of business, and that such person and persons, body or bodies politic or corporate, shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, wares and merchandize, or to receive the said purchase money.

V. And be it further enacted, That from and after the passing of this act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares or merchandize, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents ; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title or interest in or upon or to the said goods, wares or merchandize, or any such document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security as last aforesaid ; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess and enforce such right, title or interest as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid ; any rule or law, usage or custom to the contrary notwithstanding.

VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed or taken to deprive or prevent the true owner or owners, or proprietor or proprietors, of such goods, wares or merchandize, from demanding and recovering the same from his, her or their factor or factors, agent or agents, before the same shall have been so sold, deposited or pledged, or from the assignee or assignees of such factor or factors, agent

or agents, in the event of his, her or their bankruptcy ; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents ; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares or merchandize so deposited or pledged, upon repayment of the money, or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods, wares or merchandize as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents ; and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any) as may have been advanced or given by such factor or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments ; nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her or their hands, as the produce of the sale of such goods, wares or merchandize, after deducting thereout the amount of the money or negotiable instrument or instruments so advanced or given upon the security thereof as aforesaid ; Provided always, that in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her or them to the estate of such bankrupt.

VII. " And whereas it is expedient to prevent the improper deposit or pledge of goods, wares or merchandize, or the documents relating to such goods, wares or merchandize, intrusted or consigned as aforesaid to factors or agents ;" Be it therefore enacted, that if any such factor or agent, at any time from and after the said first day of October one thousand eight hundred and twenty-six, shall deposit or pledge any goods, wares or merchandize, intrusted or consigned as aforesaid to his or her care or management, or any of the said several documents so possessed or intrusted as aforesaid, with any person or persons, body or bodies politic or corporate, as a security for any money or negotiable instrument or instruments borrowed or received by such factor or agent, and shall apply or dispose thereof to his or her own use, in violation of good faith, and with intent to defraud the owner or owners of any such goods, wares or merchandize, every person so offending, in any part of the United Kingdom, shall be deemed and taken to be guilty of a misdemeanor, and being convicted thereof according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on persons guilty of a misdemeanor, and as the court before whom such offender may be tried and convicted shall adjudge.

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any person or persons to prosecution, for having deposited or pledged any goods, wares or merchandize so intrusted or consigned to him, her or them, provided the same shall not be made a security for or subject to the payment of any greater sum or sums of money than at the time of such deposit or pledge was justly due and owing to such person or persons from his, her or their principal or principals: Provided nevertheless, that the acceptance of bills of exchange by such person or persons drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals within the true intent and meaning of this act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due.

IX. Provided also, and be it further enacted, That the penalty by this act annexed to the commission of any offence intended to be guarded against by this act, shall not extend or be construed to extend to any partner or partners, or other person or persons of or belonging to any partnership, society or firm, except only such partner or partners, person or persons, as shall be accessory or privy to the commission of such offence any thing herein contained to the contrary in anywise notwithstanding.

X. Provided also, and be it further enacted, That nothing in this act contained, nor any proceeding, conviction or judgment to be had or taken thereupon, shall hinder, prevent, lessen or impeach any remedy at law or in equity, which any party or parties aggrieved by any offence against this act might or would have had or have been entitled to against any such offender if this act had not been made, or any proceeding, conviction or judgment had been had or taken thereupon; but nevertheless, the conviction of any offender against this act shall not be received in evidence in any action at law or suit in equity against such offender: And further, that no person shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act, matter or thing done by him, if he shall at any time previously to his being indicted for such offence have disclosed any such matter or thing on oath under or in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding, in or to which he shall have been a party, and which shall have been *bona fide* instituted by the party aggrieved by the act, matter or thing which shall have been committed by such offender aforesaid.

No. II.

5 & 6 VICT. C. 39.

An Act to amend the Law relating to Advances *bona fide* made to Agents intrusted with goods. [30th June, 1842.]

WHEREAS by an act passed in the sixth year of the reign of his late majesty King George the Fourth, intituled "An Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, and Merchandize intrusted to Factors or Agents," validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merchandize, and consignees making advances to persons abroad who are intrusted with any goods and merchandize are entitled, under certain circumstances, to a lien thereon, but under the said act and the present state of the law advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only : And whereas by the said act it is amongst other things further enacted, "that it shall be lawful to and for any person to contract with any agent intrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent ; provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the same, or to receive the said purchase money : " And whereas advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bona fide* advances upon goods and merchandize as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances *bona fide* made on the security thereof: And whereas much litigation has arisen on the construction of the said recited act, and the same does not extend to protect exchanges of securities *bona fide* made, and so much uncertainty exists in respect thereof that it is expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis : be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled,

and by the authority of the same, That from and after the passing of this act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.

§ 2. And be it enacted, That where any such contract or agreement for pledge, lien or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if *bona fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bona fide* present advance of money: Provided always, that the lien acquired under such last mentioned contract or agreement upon the goods or documents deposited in exchange shall not exceed the value at the time of the goods and merchandize which, or documents of title to which, or the negotiable security which shall be delivered up and exchanged.

§ 3. Provided always, and be it enacted, That this act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bona fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *mala fide* in respect thereof against the owner of such goods and merchandize; and nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt, owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bona fide* loans, advances, and exchanges as aforesaid, (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority,) and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods.

§ 4. And be it enacted, That any bill of lading, India warrant, dock

warrant, warehouse keeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid, and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control or for him or on his behalf; and where any loan or advance shall be *bona fide* made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this act; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.

§ 5. Provided always, and be it enacted, That nothing herein contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract, or non-fulfilment of his orders or authority in respect of any such contract, agreement, lien, or pledge as aforesaid.

§ 6. Provided always, and be it enacted, That if any agent intrusted as aforesaid shall, contrary to or without the authority of his principal in that behalf, for his own benefit and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title so intrusted to him as aforesaid, as and by way of a pledge, lien, or security; or shall, contrary to or without such authority, for his own benefit and in violation of good faith, accept any advance on the faith of any con-

contract or agreement to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid; every such agent shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be sentenced to transportation for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court shall award, as hereinbefore last mentioned: Provided nevertheless, that no such agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or document of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal and accepted by such agent: Provided also, that the conviction of any such agent so convicted as aforesaid shall not be received in evidence in any action at law or suit in equity against him, and no agent intrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commission of bankrupt.

§ 7. Provided also, and be it enacted, That nothing herein contained shall prevent such owner as aforesaid from having the right to redeem such goods or documents of title pledged as aforesaid, at any time before such goods shall have been sold, upon the repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon payment or satisfaction to such agent, if by him required, of any sum of money for or in respect of which such agent would by law be entitled to retain the same goods or documents, or any of them, by way of lien as against such owner, or to prevent the said owner from recovering of and from such person with whom any such goods or documents may have been pledged, or who shall have any such lien thereon as aforesaid, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting the amount of the lien of such person under such contract or agreement as aforesaid: Provided always, that in case of the bankruptcy of any such agent the owner of the goods which shall have been so redeemed by such owners as aforesaid shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy, or in case the goods shall not be so redeemed the owner shall be deemed a creditor of

such agent for the value of the goods so pledged at the time of the pledge, and shall, if he shall think fit, be entitled in either of such cases to prove for or set off the sum so paid, or the value of such goods, as the case may be.

§ 8. And be it enacted, That in construing this act the word "person" shall be taken to designate a body corporate or company as well as an individual; and that the words in the singular number shall, when necessary to give effect to the intention of the said act, import also the plural, and *vice versa*; and words used in the masculine gender shall, when required, be taken to apply to a female as well as a male.

§ 9. Provided also, and be it enacted, That nothing herein contained shall be construed to give validity to or in any wise to affect any contract, agreement, lien, pledge, or other act, matter, or thing made or done before the passing of this act.

No. III.

ACT OF THE LEGISLATURE OF NEW YORK.

An act for the amendment of the law relative to Principals and Factors or Agents. [Passed April 16, 1830.]

§ 1. After this act shall take effect, every person in whose name any merchandize shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandize to a lien thereon.

1. For any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and,

2. For any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee.

§ 2. The lien provided for in the preceding section, shall not exist where such consignee shall have notice, by the bill of lading or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof.

§ 3. Every factor or other agent, intrusted with the possession of any bill of lading, custom house permit, or warehouse keeper's receipt for the delivery of any such merchandize, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandize for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent, with any other person, for the sale or disposition of the whole or any part of such merchandize, for any money advanced, or negotiable instrument or

other obligation in writing, given by such other person upon the faith thereof.

§ 4. Every person who shall hereafter accept or take any such merchandize in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandize or document, other than was possessed, or might have been enforced, by such agent at the time of such deposit.

§ 5. Nothing contained in the two last preceding sections of this act, shall be construed to prevent the true owner of any merchandize so deposited, from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandize, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same ; nor from recovering any balance which may remain in the hands of the person with whom such merchandize shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

§ 6. Nothing contained in this act shall authorize a common carrier, warehouse keeper, or other person to whom merchandize or other property may be committed for transportation or storage only, to sell or hypothecate the same.

§ 7. Every factor or agent who shall deposit any merchandize intrusted or consigned to him, or any document so possessed or intrusted as aforesaid, as a security for any money borrowed or negotiable instrument received by such factor or agent, and shall apply or dispose of the same to his own use, contrary to good faith, and with intent to defraud the true owner ; and every factor or agent who shall sell any merchandize intrusted or consigned to him, in the like manner and with the like fraudulent intent ; and every other person who shall knowingly connive with, or aid or assist, any such factor or agent in any such fraudulent deposit or sale, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine and imprisonment, at the discretion of the court in which such conviction shall take place.

§ 8. Nothing contained in the last preceding section, shall be construed to prevent the court of chancery from compelling discovery, or granting relief upon any bill to be filed in that court by the owner of any merchandize so intrusted or consigned, against the factor or agent by whom such merchandize shall have been applied or sold contrary to the provisions of the said section, or against any person who shall have been knowingly a party to such fraudulent application or sale thereof ; but no answer to any such bill shall be read in evidence against the defendant making the same, on the trial of any indictment for the fraud charged in the bill.

No. IV.

BARING AND OTHERS v. CORRIE AND ANOTHER—2 Barn. & Ald. 137.

The character of broker is materially different from that of factor ; and therefore, where a broker sells goods without disclosing the name of his principal : held, that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the broker to him, against the demand for the goods made by the principal.

ASSUMPSIT for goods sold and delivered. Plea general issue. The cause was tried before Lord Ellenborough, C. J., at the London Sittings after Trinity Term, 1816, when a verdict was found for the plaintiffs, with £1423: 3s. 6d. damages, subject to the opinion of the court upon the following case, either the plaintiffs or the defendants being at liberty to turn the same into a special verdict.

The plaintiffs are merchants in London, and in the month of June, 1815, employed Messrs. Coles, as their brokers, to sell for them a parcel of sugars. Coles & Co. sold to the defendants the sugars on the 27th of June, 1815, and on the same day delivered to the plaintiffs the following sale note : “ Sold for account of Messrs. Baring, Brothers & Co. to Messrs. W. and E. Corrie, per Active, N. L. R. 51. 100—50 hogsheads Surinam Sugar, at 85s.” Coles & Co. were merchants as well as brokers, and bought and sold largely on their own account, and had, before the time of the sale of the sugars in question, dealt with the defendants both in buying and selling on their own account, and in the course of such dealing had previously bought goods of the defendants, for which they had given them their acceptances for £2700, which fell due on the 25th and 26th August, 1815. At the time of the sale Coles & Co. did not disclose to the defendants that they acted as brokers, but sold the sugars to them in their own names, and sent them the following note : “ Sold Messrs. Corrie & Co., per Active, N. L. R. 51. 100—50 hogsheads Surinam Sugar, at 85s. June 27th, 1815.” The defendants afterwards, on or about the 10th or 11th of July, 1815, received the following invoice, dated 27th June, 1815, from Coles & Co.: “ Messrs. E. Corrie bought of Coles & Co., per Active, N. L. R., 50 hogsheads Surinam Sugar, at 85s. per cwt.” The prompt or time of payment of the sugars, according to the usual course of the sugar trade, was two months. Coles & Co., as sworn brokers, kept a book in which they entered a memorandum of every contract made by them as such brokers ; and amongst the rest was the memorandum of the sale of these sugars to the defendants, made at the time of sale : “ Bought of Baring, Brothers & Co., for account of Corrie & Co., per Active, N. L. R. 51. 100—50 hogsheads Surinam Sugar, at 85s.” But the defendants never saw the book or memorandum, nor did they ever desire to see it, till after the bankruptcy of Coles & Co., although they might at any time have seen it by calling at the counting house. At the time of the sale Coles & Co. were employed by the plaintiffs, as their brokers, not only to sell for them their imported

goods, but also to receive from the buyers thereof the price when due ; but they did not receive a *del credere* commission. Coles & Co. became bankrupts on the 14th July, 1815, and the prompt upon the sugars expired upon the 27th August. On the 3d July, the defendants received from Coles & Co. the following order for the delivery of the sugars from the West India Docks, where they were landed and then lying : “ To the principal Storekeeper of the West India Docks—Deliver to the order of Messrs. W. and F. Corrie the undermentioned goods, imported in the month of June, 1815, and entered by John Deacon, per ship Active, Captain Mustard, from Surinam, (prime dock rates thereon being paid,) June, 1815, N. L. R. 51. 100—50 hogsheads sugar. For Baring, Brothers & Co. (Signed) John Walker.” John Walker was the the custom house clerk of the plaintiffs, and John Deacon one of the partners in the house of Baring, Brothers & Co., and one of the plaintiffs in the cause. By the usage in the West India Docks, the sugars, or other produce imported, remain in the names of the importer, or person making the entry, until such time as some purchaser thereof chooses to have the goods re-housed and entered in his name. In the mean time, and until such re-housing takes place, the order for delivery must be signed by the importer, or his agent, whatever number of sales may have been made of them ; and such order is made out for delivery to the first purchaser, unless the importer should have received a written direction from the first purchaser to make it out to some other person ; and that person, if he sell, endorses over such order to his vendee, unless, as in the former cases, such vendee should, in like manner, by order in writing, direct the endorsement to be made out to some other person. On the 22d August, 1815, the following letter, bearing date the 27th July, was sent by the plaintiffs to the defendants, being five days before the prompt upon the sugars expired : “ We request you will settle with Mr. Edward Kensington, for the amount of N. L. R. 50 hogsheads sugar, per Active, sold you by Coles & Co. on the 27th June last.” The defendants returned the following answer, dated August 23d : “ We are surprised at the directions contained in your letter, dated 27th July, last, but only delivered to us yesterday, respecting 50 hogsheads sugar, sold by Coles & Co. on the 27th June. We consider Coles & Co. as the proprietors of these sugars, and therefore the same will be settled for in account with them or their assignees.” On the 14th July, 1815, when Coles & Co. became bankrupts, the defendants were the holders of their acceptances for £2700.

This case was argued in Easter Term by *Puller* for the plaintiffs, and in the present Term by *Scarlett* for the defendants. The principal arguments for the plaintiffs were, that the defendants must have known that Coles & Co. were not selling in their own names, inasmuch as the truth of the transaction was registered in their broker's book, which the defendants might have inspected if they had chosen to do so ; and that the note delivered by them would not have bound the defendants unless it had been delivered in their character of brokers : that they possessed none of the *indicia* of property in the goods, all of which appeared to belong to the plaintiffs ; and that it was impossible that the plaintiffs could know that the

goods had not been sold by Coles & Co. in the ordinary way, as brokers, for the note delivered to them was precisely in the usual form. And if they were not to succeed in the present action, no merchant could ever again trust a broker with safety. The cases of *George v. Claggett*, (7 T. R. 359 ;) *Rabone v. Williams*, (7 T. R. 360, n. a ;) *Escott v. Milward*, (Co. Bank Laws, 236 ;) *Scrimshire v. Alderton*, (2 Stra. 1182 ;) *Morris v. Cleasby*, (4 M. & S. 566 ;) *Moore v. Clementson*, (2 Campb. 22,) were cited ; and it was contended that the rule on which the right of set-off in those cases depended was this, that where the principal has by his conduct allowed the factor to hold himself out to the world as the owner of the goods, he must take the consequences. Here, however, the plaintiffs had done no such thing ; and besides, all those cases were cases of factors, between whom and brokers there is a very material difference.

For the defendant it was urged, that this case was not to be distinguished from *George v. Claggett*, which was still a valid decision : that as to the circumstances relied on to show that the defendants knew that Coles & Co. were selling as brokers, they were not conclusive. It appeared as a fact, that they acted both as brokers and merchants, and therefore a party with whom they dealt might naturally enough, in a case where they did not mention the name of their principal, conclude that they were the principals themselves in the transaction ; and the order for delivery of the goods being given by the plaintiffs made no difference, for the only thing that it proved was, that they were the original importers. The only distinction between a factor and broker, is, that the one has possession of the bulk of the goods, and the other only of the sample ; both are in the material point the same, viz. the representatives of the real owner. And the rule of law laid down in *Hern v. Nichols*, (Salk. 289,) being, that where one of two innocent persons must suffer by the fault of a third, the loss is to fall on him who has reposed the confidence, it will follow that in this case the loss must fall on the plaintiffs, whose agents Coles & Co. were in this transaction, and who had reposed an unusual confidence in them, by permitting them not merely to sell for them, but also to receive the price of the goods when sold.

ABBOTT, C. J.—If the defendants were to succeed in this case, the effect would be that the goods of one man would be applied in discharge of the debt of another. I am not disposed to come to such a conclusion unless compelled to do so by authorities which I do not find in this case. It is said that where a loss is to fall on one of two innocent parties by the deceit of a third, that it should fall on him who employs and puts a trust and confidence in the deceiver. But this rule is by no means universal. Suppose a factor who is intrusted with the possession of goods, pledges the goods, the real owner may recover them in trover against the person with whom they are pledged. And so also if a master trust his servant with plate or other valuables, and the servant sell them, still, unless they are sold in market overt, the master may recover them from the innocent purchaser. These exceptions show that the principle is by no means universal. But

in this case has there been any negligence on the side of the plaintiffs? or rather, has there not been great negligence on the side of the defendants? Coles & Co., it appears, acted in the double capacity of merchants and brokers, and that fact was well known to the defendants. Now the distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs, in this case, have only reposed the usual confidence which every merchant must place in his broker; and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker; for the latter might by delivering to the buyer a false note, defeat the rights of his principal altogether. It is argued, indeed, that there are other facts in this case, from which it is to be inferred that the plaintiffs reposed a more than usual confidence in Coles & Co.; and for this purpose that part of the case was relied upon which states that they were employed by the plaintiffs as their brokers, not only to sell for them the several goods imported into this country, but also to receive, when due, the price of such goods from the buyers. But inasmuch as this fact applies only to the receipt of the price of goods sold by them *as brokers*, it seems to me that the fact does not alter the case. But in what situation did the defendants stand in respect of Coles & Co., and what did they omit to do? They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they make no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case, if they had not chosen to remain in ignorance. There is, therefore, a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do. There is another circumstance, which shows that if they did not know that Coles & Co. were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note. Now, without entering into the question whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say that the ordinary course of dealing was not pursued, and that enough appears to show that the defendants negligently abstained from making those in-

quiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed, and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true, that where two persons, equally innocent, are prejudiced by the deceit of a third, the person who has put trust and confidence in the deceiver should be the loser: I think the defendants are the persons who have in this case placed a more than usual confidence in Coles & Co., and that they must bear the loss occasioned by the act of the latter.

BAYLEY, J.—I am entirely of the same opinion. This is an action brought by a merchant to recover the price of his own goods, and he ought therefore to succeed, unless payment, or something equivalent to it, appears to have taken place. The demand, however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of Coles & Co., and that they have a counter-demand against them, which they are entitled to set off against the price of the goods. A proprietor, generally speaking, is entitled to receive the price of his own goods, unless, by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern v. Nichols*, (Salk. 289.) There arise then three questions:—*First*, Did the plaintiffs enable Coles & Co. to appear as proprietors of the goods, and to practice a fraud upon the defendants? *Secondly*, Did Coles & Co. actually practice a fraud? And, *thirdly*, Did the defendants use due care and diligence to avoid such fraud? All these questions must under the circumstances of this case, be answered against the defendants. It appears that Coles & Co. were both brokers and merchants, and that they on the 27th of June, 1815, were empowered to sell the goods in question. They delivered to the plaintiffs a sold note exactly in the proper form, supposing them to have sold in their character of brokers; and they delivered to the defendants a bought note, exactly suited to the case of their having sold as brokers, without having disclosed the name of the seller. If it were even doubtful whether Coles & Co. sold as merchants or not, there was at least enough to have induced the defendants to make inquiry; for, supposing them to sell in their character of brokers, it was not necessary for them to take a counter-note from the defendants; but if they had sold as merchants, that would be necessary. When, therefore, they delivered only a sale note, and required none in return, that ought to have raised a strong presumption in the minds of the defendants that the sale was in their character of brokers. And there is nothing inconsistent in that view of the case, for Coles & Co. do not say that they sell the goods as their own, and the defendants ask no questions on that subject. Then, on the 3d of July, comes the delivery order signed by the plaintiffs: at that time, therefore, the defendants must have known that the plaintiffs were parties concerned, and might have satisfied any doubts which they entertained upon the subject. It is besides to be

observed, that the plaintiffs did not trust the brokers with either the muni-ments of their title, or the possession of the goods, as was done both in the case of *Rabens v. Williams*, and that of *George v. Claggett*. There is another circumstance by which the defendants might easily have ascertained whether Coles & Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case ; so that if the defendants had asked to see the book, they would instantly have discovered whether Coles & Co. acted as brokers or not. I think, therefore, that it appears from these circumstances the plaintiffs did not by their conduct enable Coles & Co. to hold themselves out as the proprietors of these goods, and so to impose on the defendants ; that the defendants were not imposed upon, and even supposing that they were, that they must have been guilty of gross negligence. Besides, when Coles & Co. stood at least in an equivocal situation, the defendants ought, in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed when they bought the goods, that Coles & Co. sold them on their own account ; and if so, they can have no defence to the present action. The course of dealing, it appears, was for the brokers to receive for the plaintiffs the price when due : if, therefore, the defendants had remained ignorant of the state of things till after that period had arrived, the case might have been different ; but, before that time arrived, it appears that they were distinctly informed that the plaintiffs were the proprietors of the goods. There must, therefore, be judgment for the plaintiffs.

HOLROYD, J.—I am of opinion that the defendants have not any right of set-off in this case. A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority ; and it may be right, therefore, that the principal should be bound by the consequences of such sale ; amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different ; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance ; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sell in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so unless the principal delivers over to him the possession and *indis* of property. The rule stated in the case in *Salkeld* must be taken with some qualifications ; as, for instance, if a factor, even with goods in his possession, act beyond the scope of his authority, and pledge them, the

principal is not bound ; or if a broker having goods delivered to him, be desired not to sell them, and sell them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of *caveat emptor* applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of set-off cannot be allowed.

Judgment for plaintiffs.

INDEX.

ACCOUNT.

Action of, 55.

In what cases it lies, and where *indeb. assumpsit* lies, 56, 57.

Where a reasonable time has elapsed, presumed that account has been demanded, and that agent has accounted, 48, n. (1).

Fourteen years sufficient to allow of this presumption, *ib.*

Duty of agent to keep an account, 47.

Consequence of neglecting to do so, 48.

Account decreed in equity, *ib.*

Agent mixing his property with that of principal, without keeping account, the whole taken to belong to the principal till agent can distinguish, *ib.* and 10, n. (2).

Inferior agent only accountable to his immediate employer, 49, and n. (e).

Accounting for profits, &c. made by dealing with principal's property, 49.

Specific property purchased with principal's money, agent considered as trustee, 51.

Account stated, what, and effect of, 52, n. (A).

Notwithstanding account settled and release, court of equity will open the account, 52, 292.

Action of *assumpsit* for not accounting, 56, 57.

Allowance in account of charges, advances, &c. See *Allowance*.

Agent lending or paying money without authority, though for principal's benefit, not allowed it in account, 109, and n. (1).

ACCOUNTANT.

Has no lien on papers of employer, 131, n. (A).

ACTION.

(See *Action on the Case, Responsibility, Trover, Trespass.*)

Action against agent for price of goods sold by him does not in general lie till he has received it, 39.

Unless where he has improperly given credit, or the delay of payment arises from his default; or has admitted that he has received it, whether the fact be so or not, 40. See *Broker*.

Action does not lie for part of the price, though received, *sed qu. ib.*

But action lies against an agent *del credere* on default of the person primarily liable, whether the money be received or not, 40. See *Del Credere*.

And agent may make himself immediately liable, as by giving bill or note in his own name, 43.

- Agent called upon to account cannot dispute the title of his principal, 53.
 On the death of one joint principal the remedy survives, *ib.*
 Actions by principal against agent, 55, &c. See *Assumpsit, Debt, Trover, Action on the Case.*
 In action by principal against agent, only the balance recovered after making all just allowances, though no set-off, 62, 126.
 What charges, &c. allowed in account. See *Allowance, Commission.*
 Interest when recoverable, 62.
 To action by principal for money received to his use, where agent cannot set up the illegality of the transaction, 62 and 89.
 Where such defence may be used, 64.
 In such cases action does not lie for money had and received to the principal's use, where the agent has only debited himself with the amount, 65, and n. (6).
 Action for misconduct. See *Action on the Case.*
 Action by principal for goods sold by factor may be in his own name, 324.
 Action lies by principal to recover back money wrongfully paid or extorted from agent, 336, 337, n. (d).
 What actions agents may bring in their own names, 361.

ACTION ON THE CASE.

(See *Agent, Responsibility, Trover.*)

- To support an action against an agent by the principal for damage arising from negligence, &c. the damage must be real, 7, 74, but see n. (2).
 Action for not insuring. See *Insurance.*
 Action for misconduct—where it lies, 71, &c.
 What necessary to support such action, 73.
 Actual damage, *sed qu.* 74, n. (2).
 Default of agent, 76.
 Where it lies against a *gratuitous* agent, 76.
 Not for mere nonfeasance, 77.
 Nor for unskilfulness, unless he be in a situation which implies skill, 77, 78.
 Death of agent puts an end to actions for misconduct, 96.
 Principal responsible to agent who has sustained an injury in consequence of deception practised upon him, or necessary information withheld, 152.
Quære, how far the rule that there is no contribution amongst wrong-doers will affect the right of an agent to recover for a *tort* committed by him, *ib.*
 Agent engaged in the commission of an act known to be a trespass cannot recover, although principal expressly promise to indemnify him, *ib.*
 So, if act turn out to be a trespass, a promise of indemnity will not be implied, 153.
 Action lies against principal for fraud, negligence, or misconduct of agent, 294.
 Though for wrong not done by the agent first employed, but by a subordinate one, 296.
 But only for acts within the scope of agent's employment, 298, 402.
 Exception in favor of certain public officers, 300.

What acts of agent make principal liable in trover, 305. See *Trover*.

Where several agents employed, the action must be either against the principal, or the agent immediately committing the wrong, 307, 402.

In action charging the master with negligence in driving, evidence that the servant drove sufficient, 309.

ADMISSIONS OF AGENT.

(See *Evidence*.)

Admission of wife, who alone transacts the husband's business, binding on the latter, 163, n. (e).

Admission of debt by agent, where sufficient answer to the statute of limitations, 267.

Admission, to be binding upon principal, must be made by a general agent, 267, n. (b).

Where the admission of agents as to particular facts dispenses with proof of those facts, 268.

Where not, *ib*.

Distinction between such declarations as form part of contract, and such as relate to particular facts, *ib*. 269, 270.

Discussed in the case of *Farlie v. Hastings*, 269 to 272.

Admission of agent that a bond was in the hands of his principal not sufficient to establish the fact, 269.

How far admission of agent may be assimilated to that of principal, 270.

Quære the case of *Biggs v. Lawrence*, where an acknowledgment by agent of the receipt of goods was admitted as evidence, 271, &c. See *Evidence*.

AFFIRMANCE.

(See *Assent, Authority*.)

AGENT.

What, 1.

What may be done by, *ib*.

Who may be, 2.

Distinction between general or special, 199.

Neither the purchaser nor the seller can act as the agent for the other, 33.

How assimilated to a trustee, 34, n. (m).

Authority, how created and where implied, 155, &c. See *Authority*.

General duties of agents, 3.

Particular, 12, &c.

Cannot derive advantage from disobeying instructions, 4.

Goods sent to a particular place to be sold, if agent carry them elsewhere he is liable if they be lost, 3, n. (a).

Deviation from orders at his own risk, unless principal adopt his act, 4.

When *ex necessitate*, may transcend authority, 3, n. (n,) 209, n. (A).

Duty to pursue the usual course of business, *ib*. See *Trade*.

To possess adequate skill, *ib*.

Gratuitous agent when liable, 6.

Responsibility of agent, 7. See *Responsibility, Action on the Case*.

Exonerated by pursuing the usual course of business, 9. See *Trade*.

Cannot make himself an adverse party to his principal, 10. See *Sale, Purchase*.

Grants made to agents, in what cases void, 11, 12.

How far responsible for safety of goods, &c. 15, 16, and n. (3). See *Factor, Insurance*.

Agent for sale cannot be the purchaser, 33. See *Sale, Purchase*.

Agent employed to purchase cannot be the seller, 37. See *Purchase*.

Neither of the contracting parties can do any act necessary to the validity of the contract in the character of agent to the other, 33, n. (3).

If agent sell his own goods to principal, liable to account for the profits, 37, 38.

Agent employed to procure timber for a colliery, furnishing his own, decreed to account for the profits, 38.

Duty to keep principal informed of his proceedings, 38, 39.

For what losses an agent is responsible. See *Responsibility, Loss*.

Agent parting with principal's property under forged or invalid authority liable to make it good, 44, and n. (f).

Not answerable for loss occasioned by failure of persons in whose hands he has placed the money of principal, if in the usual course of trade, 45. See *Banker*.

Agent taking bills of persons in credit at the time, not responsible if they prove bad, *ib*. See *Trade*.

But *aliter* if he place his principal's money at his banker's in his own name, and the banker fails, 46, 47.

Agent purchasing specific property with principal's money, considered as trustee for principal, 51.

Joint agents. See *Factor, Joint Agents, Partner*.

General duty of agent may be narrowed by covenant, 67.

Agent bankrupt, remedy in that case, 82, &c. See *Bankrupt*.

Death of agent, remedy in that case, 95, 96. See *Death*.

Agent's right to commission, 100. See *Commission*.

Agent, whose duty requires him to give up his whole care to his employers, letting out his service to another for a certain reward which is paid to his employer, cannot recover it from him, 105, 106.

Agent's right to be allowed advances, disbursements, &c. See *Allowance, Disbursements*.

Lending money without authority, not allowed it in account, without proof of acquiescence by principal, 115.

Agent's lien on goods, &c. See *Lien*.

Agent for sale at common law could not pledge. See *Pledge and Factor's Act*.

Agent witness to prove authority, 319.

Authority of agent to discharge, compound or release debts, 290. See *Debt, Debtor*.

- Agent responsible himself to debtor on composition made without authority, 291.
- What description of agent sufficient for signing agreement within the statute of frauds, 313. See *Frauds Statute of, Broker*.
- Where a demand by agent sufficient to rebut the plea of tender, 343, 344.
- Where demand by and refusal to agent sufficient to support trover by principal, 343.
- Wherever a demand or notice by agent is to affect a third person with damages, he must be authorized at the time, *ib.* &c.
- In what case acts done without authority enure to the benefit of principal, 345.
- What actions agents may bring in their own names. See *Trover*, 361.
- Before intervention of principal, agent a good petitioning creditor against purchaser, *ib.* n. (1).
- What remedies agents have against third persons for their own indemnity, 364.
- Personal liability of agents to third persons, 368.
- Not in general liable on contracts made as agents, 369.
- Exceptions as to masters of ships, 388.
- In what cases agents personally liable, 371.
- Where not known to act as agents, *ib.* 372.
- Or principal concealed, *ib.*
- Where no responsible principal to resort to, 374.
- As commissioners for canal, &c. contracting for work, personally liable, 375, n. (o).
- So one contracting for work for the parish, 375.
- Agents of government not liable on contracts made for government, 376, 377, n. (t).
- Agent personally liable where he binds himself by the contract, 378, &c. 381, 382.
- As on memorandum "received 40*l.* to the use of my master, to be paid at Michaelmas," servant held liable, 378.
- So on bill drawn on J. B. cashier of Y. B. Company, and accepted generally, 379.
- Other instances, *ib.* 380, 381.
- Agent drawing or accepting a bill generally, liable personally, 380.
- So if he indorse a bill without qualification, 381.
- Covenant by A. B. for himself, &c. though described to be for and on behalf of another, makes him personally liable, 382.
- So on arbitration bond, 383.
- Where personally liable on his warranty, 385. See *Warranty*.
- Agent exceeding his authority, so that principal not bound, liable personally, 386.
- Action against agent to recover back money erroneously paid to him, where it lies, 388.
- Where it must be brought against the principal, 390.

Cannot in general be maintained against agent after payment over by him to the principal without notice, 390 to 394.

Unless money was not paid to agent for the purpose of his paying it over to principal, 306, n.(8), 390, n. (14).

Agent in the condition of *stakeholder*, where justified in paying over, 391.

Action lies by person to whose use money paid by principal to agent, 394.

But there must be a specific appropriation of the money by the agent to the use of the third person, or it must be received for the purpose of being handed over, 394.

Liability of agents for their own tortious acts, 396, &c.

Not liable to third persons for mere nonfeasance, *ib.*

Exception as to masters of ships, 398.

How far liable for acts done under the command of principal, 399.

Cases in which principal alone liable, 401.

Agent guilty of excess in the execution of a lawful command, personally liable, 402.

ALLOWANCE.

What charges and disbursements allowed in account with agent, 107.

In what cases advances made without authority, but from emergency, allowed, 108.

Agent insuring without authority under particular circumstances, to be allowed premiums paid, *ib.*

But otherwise if without particular authority to insure, or circumstances of necessity, *ib.*

Unless the insured acquiesce on being informed, *ib.* 109.

Voluntary payments not allowed, *ib.* 110, 111.

Instances of voluntary payments, *ib.*

Agent deserting his duty not entitled to charge advances made, 105.

Agent lending principal's money without authority, not entitled to have it allowed in account, though for principal's benefit, 115.

Unless the latter by acceptance of interest or other act acquiesce, 115.

Not allowed expenses and disbursements occasioned by his own ignorance, 116.

Advances made in the course of illegal transaction not allowed, *ib.* See *Illegal Transaction*.

Advances and disbursements made after notice of principal's bankruptcy, not allowed, 121. See *Bankruptcy*.

In action against agent he may give in evidence what he is entitled to be allowed without set-off, 124, 125, 126, but see n. (10).

ASSENT.

Where subsequent assent of principal supplies the want of previous authority, 171. See *Authority*.

By assenting to agent's acts in part, principal adopts the authority as to the whole, 115, 172, 324, 331.

ASSUMPSIT.

- Indebitatus assumpsit* where it lies by principal against agent, 56 to 62.
- Assumpsit* for not accounting, 58.
- Where the remedy may be either by action or bill in equity, 60.
- Special *assumpsit* does not lie for money delivered for a special purpose, till there has been a failure in applying it, 59.
- So it does not lie for money had and received, unless trust closed, *ib.*
- Where *assumpsit* for money had and received proper, 60.
- After balance struck and promise to pay, *indebitatus assumpsit* lies notwithstanding covenant to account, *ib.*
- Indebitatus assumpsit* lies where money paid for special purpose and not so applied, 61.
- So if the purpose be countermanded, whether legal or not, 61, 66.
- The sum to be recovered against agent is only the balance after deducting all just allowances, 62. See *Set-Off*.
- Assumpsit* does not lie where there is a covenant to account, 67.
- Unless where balance struck, 60, 67.
- Where assignees bringing *assumpsit* for goods sold by bankrupt it is an adoption of his act, 173, n. (w).

ATTORNEY

- Power of. See *Power of Attorney*.
- Payment to attorney, where a discharge, 277, n. (l).
- Order of *Nisi Prius*, by which cause is referred by attorney, though contrary to desire of client, will not be set aside, 291, n. (e).
- Attorney bringing action by direction of his client, though he knows it to be groundless, not liable to an action, 401.
- But liable for mistakes which cause damage to the defendant, *ib.*
- Demand of debt by attorney's clerk not sufficient to rebut the plea of tender, *aliter* by attorney himself, 344.
- Lien of attorney or solicitor for costs, &c. 131, n. (A).
- If attorney can accept a gift from his client, 11, n. (l).
- Authority to discharge debts, 192, n. (3).

AUCTIONEER.

- Undertaking to observe the forms necessary to save duties, by 19 Geo. III. and 28 Geo. III. and having by a blunder incurred those duties, not entitled to charge them, 116.
- Authority given to auctioneer to sell, does not authorize his clerk in his absence, 175, 316.
- Auctioneer after sale has no authority to treat about the title, 188, 208.
- On sale under written particulars verbal declarations of auctioneer at the sale not allowed to be proved, 257.
- Quære*, If not admissible where personal information is given to the purchaser of a mistake in the particulars, *ib.* n. (3).

Auctioneer agent for both parties within the statute of frauds on sale of personal but not of real property, 313.

Since determined that an auctioneer is an agent for the purchaser of real property, 314, n. (2).

Auctioneer selling goods of B. as goods of A., payment by buyer to A. binding, 325, n. (3).

Auctioneer may maintain an action in his own name for the price of goods sold by him, 362

Auctioneer not disclosing principal at the time of sale, personally liable on the non-execution of the contract, 372.

Auctioneer, paying over proceeds to immediate principal, if liable to third party, 390, n. (14,) 391, 392, n. (e).

AUTHORITY.

How created, 2, 155.

General and special, 2.

General authority, what is, 199, n. (9).

Limited and unlimited, 2.

Agent disposing of principal's property under forged or invalid authority, liable, 44, and n. (f).

Where it must be in writing, 155.

Where it must be by deed, *ib.*

Where to bind principal under seal, must be by deed, 157.

Verbal acknowledgment of authority under seal, not sufficient proof of it, but the authority itself must be produced, 158.

Where the authority of an agent within the statute of frauds must be in writing and where it need not be in writing, *ib.*

Authority to accept, draw, or indorse bills, need not be in writing, 160.

Implied authority, doctrine of, 161.

Previous employment, in what cases it gives authority, 161, &c.

One previous instance of authority to buy on credit held sufficient to bind principal, 162, but see n. (2).

Implied authority arising from employment continues after employment ceases, unless after actual notice or considerable lapse of time, 170.

One who had been used to draw bills in principal's name, drew a bill immediately after being turned out of employment: held to bind the principal, 170.

Other instances, *ib.*

Want of previous authority supplied by subsequent acts of principal, 171, 211.

What amounts to evidence of assent, 171.

Adoption of agency in part is an adoption of the whole, 172.

Where assignees bringing *assumpsit* for goods sold by bankrupt, it is an adoption of his act, 173, n. (w).

Execution of authority, 175.

Must be executed by the person to whom it is given, *ib.*

Within what period must be executed, 189, n. (7).

- Authority given to A. to sign an agreement for a lease not well executed by an agreement signed by his clerk, although approved of by A., and done in the usual course of his business, 176, n. (1).
- Authority to two cannot be executed by one, 177.
- Authority to three jointly and separately, not well executed by two, *ib.* but see n. (g.) As to *Form of Execution*, see *Execution*.
- Construction of authority, 189, &c. See *Power of Attorney*.
- Where authority to sell empowers agent to warrant, 197. See *Warranty*.
- Where agent for sale is empowered to warrant, it is not necessary to show a special authority, *ib.*
- Agent has authority to do all acts subordinate to or necessary to effectuate his employment in the best manner, 189, 209.
- Therefore even a special agent must be expressly restricted, in order to limit his authority, 209, 210, 211.
- General* and *special* authority, difference as to the power of restriction, 199, 207, 208.
- General authority to be collected from general dealing, not from private instructions, 199, n. (9).
- Effect of *general* authority, 200, &c.
- Cannot be restrained by private instructions in a particular case, 199, n. (9), 201, 205.
- Special* agent may be restricted, 203, 204.
- General agent taking note instead of exchequer bills as ordered, binds principal, 204.
- Aliter* of special agent, 206.
- Factor's authority. See *Factor, Sale*.
- Authority, how proved, 309, &c. See *Evidence, Witness*.
- Where it is necessary that agent at the time of making demand, &c. should produce his authority, 347.
- Coupled with interest, when irrevocable, 184, 185, n. (d).

BANK.

- Liability for acts of cashier or other officer, 156, n. (1).

BANKER.

- Property of, in bills not due, paid in by his customer, 91, see *note*.
where indorsed by customer, *ib.*
when discounted by him, *ib.*
- Indorsement *prima facie*, evidence of discounting, *ib.*
- Taking banker's acceptances in exchange for bills equal to discounting, *ib.*
- Though acceptances should be dishonored, *ib.*
- Property of, in bills and other securities, deposited with him, 88, 233.
- When considered as holder for value, 131.
- His right against acceptors, though money received by customer from drawer, *ib.*
- Property of, in bills *entered short*, 92, see *note*.
- Though entered as cash and credit given upon them, *ib.*

Where banker has no property in bills entered as cash, 89.

Where he has an absolute property, 89, but see 90, n. (a).

Property of, in bills, where authority to negotiate is limited, 92.
where authority is general, *ib.*

Where right to reclaim bills extends, 93.

Where not, 94.

Liability of banker employed to receive payment of a bill, 9, 45.

paying drafts of customer after notice of act of bankruptcy, 121.

agent placing his principal's money in his own name with his
banker, 46.

Where bankers have a lien for their general balance, 94, 131.

Where they have not, *ib.*

Rights of assignees on banker's lien, *ib.*

How right of banker to transfer negotiable instruments may be restricted:
90, n. (a).

Bankers are allowed commission for agency by usage, 107.

BANKRUPTCY.

Goods in the hands of factor not within 21 Jac. I. c. 19, and 6 Geo. IV. c.
16, s. 72, 82, 83, &c.

Quære, if not under certain circumstances, 84, n. (f), and n. (2).

Property of assignees in bills discounted by banker, 91, n.
in bills not due paid into bank, *ib.*
when indorsed, *ib.*

What equivalent to discounting, *ib.*

Property of assignees in bills where general authority given to banker to
negotiate, 92.

Goods detained by assignees of agent may be recovered by principal, sub-
ject to lien for everything for which the estate is creditor, 86, 87.

Remedy for their recovery trover or petition, 88.

Bills entered short do not pass to assignees, 92.

Though entered as cash, and customer allowed credit, *ib.*

Nor where authority to negotiate is limited to certain circumstances, *ib.*

Nor where they are deposited with banker in order merely to his receiving
payment, 88.

Where money received by bankrupt cannot be reclaimed, 90.

Where it can, 95.

If laid out in any specific thing, *ib.*

As where money had been laid out in American stock, &c. 87, n. (4).

Agent not allowed disbursements after notice of principal's bankruptcy, 121.
See *Banker*.

What payments protected by 1 Jac. I., c. 15, now 6 Geo. IV. c. 16, s. 82, 122.

Where bills having been accepted by factor on consignments before bank-
ruptcy, and paid after, such payments are protected, 122.

Where not, 123.

A *bona fide* payment under the 82d sect. of new Bankrupt Act, must be
such as is sanctioned by regular course of trade, 125, see *note*.

A payment by or to bankrupt can only be affected by notice of prior act of bankruptcy, *ib.* 126.

Where assignees bring *assumpsit* for goods sold by bankrupt, it is an adoption of his act, 173, n. (w).

Where agent is a good petitioning creditor against the purchaser, 361, n. (1).

Corporations and public companies may prove debts by an agent however appointed, 157.

What necessary to enable an agent to vote in choice of assignees, *ib.*

One assignee cannot verbally authorize another to release *by deed*, 158.

BILL OF EXCHANGE.

Agent's duty in negotiating, 5.

Agent's duty in giving necessary notice to principal, 39.

Authority to accept, draw, or indorse, need not be in writing, 160.

Bills drawn by agent usually employed to issue notes bind principal, 163, 169.

Agent specially employed to get a bill discounted may indorse it in the principal's name, unless expressly prohibited, 202.

Agent taking bill or note instead of money, where principal bound by, 202, 209.

Bill or other negotiable instrument, if wrongfully transferred, cannot be reclaimed from the holder unless restricted, 233.

The negotiability of a bill is restricted where there is a particular direction upon it, 236.

Possession of bill of exchange by agent sufficient in general to authorize payment to him, 276.

Declaration on bill stating defendant's indorsement "his own proper hand being thereunto subscribed," evidence of indorsement by agent sufficient, 308, n. (1).

So bill accepted by agent may be stated to have been accepted by principal, *ib.*

Bill of exchange over due indorsed by agent to third person, indorsee takes it subject to equity which affected it in hands of agent, 119, n. (t), 339.

BILL OF LADING.

Factor may assign by way of sale, 239. See *Pledge*.

But cannot pledge, 214, &c. But see *Factor's Act*.

Before the factor's act the pledgee had no title, even where the possession and indorsement of the bill of lading was legal in the first instance, if the transaction were subsequently converted into a pledge, 215.

Bill of lading is the regular authority to factor to sell, but in some cases letter of advice sufficient, 240.

BILL IN EQUITY.

(See *Equity*.)

BOND.

Payment of interest to agent, 274.

Must be to one having custody of the bond, *ib.* 275.

Payment to agent through whom the money had been advanced, and who had usually received the interest, not sufficient without possession of the bond, 275.

Possession of the instrument by agent evidence of authority to receive principal and interest, 275.

Except in case of mortgage bond, *ib.* n. (e).

BOUGHT AND SOLD NOTES.

Form and effect of, 315, and n. (g), *ib.*

BROKER.

(See *Determination of Authority.*)

Description of, 13, n. (a).

Difference between broker and factor, 13, *App.* 4.

Qualification and admission, 13, n. (a).

Form of bond entered into to the mayor, &c. of London by a broker on his admission, 14, n. (2).

Purchase by a broker in his own name with the authority of principal, not a breach of the condition of bond, *ib.*

Condition of bond not absolute prohibition against broker dealing as trader on his own account, but only prohibition, *sub modo*, *ib.*

Broker really engaged as principal, acting ostensibly as broker, guilty of a gross fraud, *ib.*

Broker allowing another to have concurrent and equal authority with himself in his business, does not commit a breach of the condition of that part of the bond, which prohibits his employing any person under him, *ib.*

Broker paying money, on refusal of principal, cannot recover it from him, 110.

Unless where either by contract or custom he is guarantee for the payment, *ib.*

Broker under ordinary commission voluntarily paying loss for underwriter cannot charge it, 111.

Aliter if *del credere*, 111. See *Allowance, Disbursements.*

So where the consideration was premiums advanced on *illegal* insurances, 117.

Insurance brokers have a lien upon policies for their general balance, 130.

But if a broker employ a sub-agent to effect policies, informing him they are for another, the sub-agent has no lien as against the principal for the general balance due to himself from the broker, 148.

But where notice is not given that the policies are not on account of the person from whom the broker receives the orders, the general lien attaches, 150.

And if the policy be parted with and afterwards come into broker's possession, the lien revives, 145.

A broker without the knowledge of principal making himself responsible to

- the seller, has no lien on the goods purchased for the money he may pay, 132, 133.
- A. by order of his correspondent employed his broker to effect insurance on a ship warranted *neutral*, held that the broker had no lien on the policy for a debt due from A. the warranty of neutrality being notice that A. was only agent for another, 147, 148.
- Broker employed to effect policy has authority to adjust losses, 191.
- So broker employed to settle losses, has authority to refer a dispute about a loss to arbitration, *ib.*
- Broker specially employed to buy at a certain price, does not bind principal if he exceed that price, 208.
- Aliter of broker generally employed, 209.
- Cannot sell stock upon credit, unless specially authorized, 212.
- Broker, with whom goods were deposited by agent, consignee paying duties, &c. held to have a lien in his own right, not derived from agent, 217.
- But this case has since been overruled, *ib.* n. (5).
- Principal not discharged by paying his own broker, 243.
- Unless vendor, by neglecting to call upon principal, induce the latter to suppose that he has given credit to the broker, *ib.*
- Effect of broker's representation on *insurance*, 257.
- Effect of concealment by broker, in avoiding policy, 258.
- Concealment of material fact by intermediate agent avoids the policy, though both the principal and the person actually effecting the policy be ignorant of it, *ib.*
- To affect policy the representation must be at the time of subscribing the policy or slip, 261. See *Insurance*.
- Payment to broker, where it discharges the debt to the principal, 278, 279. See *Factor*.
- Sale by broker. See *Sale*.
- Where broker agent for both parties, so that sale note signed by him binds both buyer and seller, 315.
- Requisites of sale note, *ib.* n. (g).
- Bought and sold note not sent for approbation, but for information, 315.
- Bought and sold notes are sufficient without an entry of the contract in broker's book, *ib.*
- Where sale notes differently describing the goods are delivered, no contract arises, 315, n. (g).
- Broker witness on behalf of principal to prove a contract, though he has a *per centage* on the price, 358.
- Broker may maintain action in his own name on policy effected by him 362.

CARRIER.

Whether has lien for general balance, 130, n. (s).

CASHIER.

Extent of authority, 156, n. (1).

Liability of bank for his acts, *ib.*

CHARGES.

What charges agent entitled to be allowed, 105, 106, 107. See *Allowance, Disbursements.*

COLLECTOR OF THE REVENUE.

Liability of to party paying duties &c. illegally demanded, 398, n. (t).

COMMISSION.

Agent's right to, 100.

Cannot legally claim it, if left to the honor of the employer, 101.

Amount of, when regulated by statute, *ib.*

Cannot be recovered for *illegal* employment, 102.

Aliter if agreement may be legalized by certain precautions being observed, 103, n. (4).

May be forfeited by the conduct of agent, as by not keeping account, 104.

By departing from his character of agent and acting adversely to his employer, 105.

So if through negligence, agent's services are nugatory, he is not entitled to commission, 105.

Agent undertaking business without authority or stipulation for reward, and keeping no account by which his wages might be ascertained, the claim disallowed altogether, 104, n. (f).

Agent made executor, commission ceases, 105.

Where right to commission depends on a contingency, commission not payable until contingency happens, 107.

Commission on consignment insurable, 100, n. (a), 138, n. (d).

COMPENSATION.

Party may be entitled to, although there be no agreement, 100, n. (1).

COMPOSITION.

Authority of agent to compound debts, 290. See *Debt.*

Agent cannot compound or commute debts without authority, 291.

Broker employed to effect policy may adjust losses, 160, *ib.*

So broker having an authority to adjust losses, may refer a dispute about a loss to arbitration, 191.

Release on composition under power of attorney must be in the name of principal and not of the attorney, 292.

CONTRACTS BY AGENTS.

Contracts made by agents may be binding, though not strictly pursuing the authority, 25.

Contract of sale. See *Sale.*

Contracts made under implied authority, where principal bound by: where not, 161, &c. See *Authority*.

Where goods, &c. bought by agent upon credit come to the use of principal, the latter is only discharged by showing that he always gave the agent money beforehand, or that the goods were furnished on agent's credit, 165, 245.

Where principal bound by contracts, not made pursuant to authority, 198, &c.

Contract for freight, factor's power to make, 241. See *Freight*.

Principal cannot avail himself of a fraudulent contract made by his agent, 325.

In action on contract made by agent it may be described as made with principal, 308.

Contract stated to be with agent appeared by the sale note to be with him for principal the variance not material, 362, n. (f).

Evidence of contracts by agents, 317.

Action by principal on contract of agent, 323.

Contracts made by agent without the privity or authority of principal may be adopted by the latter, 324.

But in so doing he adopts the acts of the agent *in toto*, *ib*.

CORPORATION.

How may appoint agent or attorney, 155, n. (a).

If liable on contract not under seal, *ib*.

COVENANT.

Where there is a covenant or bond to account, *assumpsit* does not lie till balance struck, 67.

General duty of factor or agent may be narrowed by covenant, *ib*.

Assignment of breach must be within the terms recited in the condition, though the obligatory part be larger, 68.

If recital mention a particular place or time, the breach must be accordingly, though the obligation be general, *ib*.

Covenant to "account," breach in neglect to "pay," 69.

Pleading in action on covenant, *ib*.

Covenant as surety for the fidelity of agent, 70, n. (r).

Covenant by agent in his own name, though for and on the behalf of another, binds him personally, 382.

CREDIT.

In what cases an agent may sell upon credit, 26.

May sell upon credit if such be the usage of the trade in question, 26, 173, 212.

Aliter if no such usage, 212.

Cannot sell *stock* on credit, *ib*.

Nor to a person notoriously discredited, unless specially directed, 27.

If agent sell goods of the principal upon credit to one who proves insolvent,

and at the same time goods of his own to the same person for money, strong evidence of his knowledge of the insolvency, *ib.*

The time of credit given must be reasonable and customary, *ib.*

And the security such as may be enforced without extraordinary risk or trouble, *ib.*

Where agent authorized to take up goods on credit so as to bind principal, 161, &c.

Where not, 162. See *Authority*.

Servant to whom master always gives money *before-hand* to pay, buys upon credit, principal not liable, 164.

Aliter if at any time he has authorized servant to buy upon credit, 165.

Unless where the seller has given credit to the agent, as by suffering the accounts to run to a long arrear, &c. *ib.*

Credit given to agent, where it discharges principal, 243, &c. 371.

CREDITOR.

May resort to principal for his debt notwithstanding any private agreement between the principal and agent, that the latter only shall be liable, 243.

Or notwithstanding the principal has paid his own agent, *ib.*

Unless from circumstances he be induced to suppose that the vendor has given credit to the agent, *ib.* 245.

As by the latter neglecting to call upon the principal for a long time, 246.

But if the employer, by always paying the agent in advance, has never sanctioned his buying on credit, he is not liable, 164, &c. 245.

Receipt given by creditor to agent does not discharge the principal without actual payment, unless it has been passed in account, and credit given by principal on the faith of it, 253.

Creditor receiving in payment a check of agent which is dishonored, does not discharge the principal, 251, n. (9).

CUSTODY.

How far agent liable for safe custody of goods in his possession, 15, 16, &c.

Cannot in general transfer the custody to other hands, 17.

But allowed under certain circumstances, *ib.*

CUSTOMS AND DUTIES.

Where it is the duty of agent to pay them, 23.

Consequence of neglecting, 24.

Quære, if factor entitled to have for himself customs saved by his management, 24.

DEATH OF AGENT.

Determination of authority by, 189, n. (7).

Remedy for principal in case of agent's death, 95.

Puts an end to personal remedies by action for fraud or misconduct, 96.

But where agent has made profit by fraudulent dealing with principal, his estate made accountable in equity, *ib.*

DEATH OF PRINCIPAL.

Effect as to determining authority, 186, and n. 5, *ib.*

DEBT.

Action of debt, where it lies against agent, 60.

Money delivered to agent for special purpose, and not applied or the purpose countermanded, is a debt proveable under agent's commission, 62.

No private agreement between principal and agent that the latter is to pay the seller, discharges the liability of the principal, 243.

Payment to agent where a discharge, 274. See *Payment, Debtor.*

Agent having *general* authority to receive payment may receive it in any manner authorized by the ordinary course of business, 290.

Aliter of special agent, *ib.*

Authority of agent to compound, release, or discharge debts due to principal, *ib.*

Even general agent for receiving payment cannot *commute* the debt by receiving some other thing, as a horse, &c. 291. See *Composition.*

Where debt due from factor may be set off by vendee against the principal, 325.

DEBTOR.

Where discharged by payment to agent, 274, &c.

Payment of debt on bond or other written security, must be to one having the custody of the instrument, *ib.* See *Bond, Bill of Exchange, Payment.*

Debtor discharged by payment to agent in possession of the instrument, 275.

Where discharged by payment to factor, 278. See *Factor.*

Where a debtor to principal may set off a debt due to himself from factor, 325.

DECLARATIONS.

See *Admissions.*

Declarations and representations of agent accompanying contract bind principal as part of the contract, 256, 267.

But must be made at the time of the particular contract, 256. See *Warranty, Insurance.*

On sale made under written particulars, verbal declarations of auctioneer at the sale not allowed to be proved, 257.

Quære, if not admissible where personal information is given to the purchaser of a mistake in the particulars, *ib.* n. (3).

Distinction between such declarations as form part of contract, and such as relate to particular facts, 269, 270, &c.

Former received in evidence, latter not, *ib.* &c. See *Admissions, Evidence.*

DEL CREDERE COMMISSION.

Description of, 41.

A *del credere* agent was held liable not only for the solvency of debtor, but for payment absolutely, *ib.*

But this doctrine overruled, *ib.* n. (d), 111, n. (3).

He is merely surety to his principal, *ib.*

And liable only for the solvency of those with whom the principal deals through his agency, 111, n. (3).

Declaration must aver default of principal debtor, *ib.*

Liability of *del credere* agent where he receives the price of goods from the purchaser, and remits it by bills to his principal, 41.

The principal must always be the debtor, except where the broker has, by the form of the instrument, made himself liable, 112, see *note*.

A broker, though not acting under a *del credere*, may render himself directly liable to his principal, 43, n. (3).

Rights of third persons not privy to the contract are not affected by *del credere* commission, 286.

DELIVERY TO AGENT.

When sufficient to charge the principal, 293.

Effect of delivery to agent to vest the property of goods in principal, and prevent the owner's right to stop them in *transitu*, 347.

Goods must have reached their final destination, and not be at a stage upon their transit, 350.

Delivery to an agent merely employed in expediting the passage of goods, does not prevent the owner from stopping them in *transitu*, 348 to 350.

Cases in which delivery to an agent is sufficient to prevent the stoppage in *transitu*, 350 to 357.

DEMAND.

Wherever demand or notice by agent is to affect a third person with damages on refusal, he must be properly authorized at the time, 343.

Where demand of debt by agent sufficient to rebut plea of tender, *ib.*

by attorney's clerk not sufficient, *aliter* by attorney himself, 344.

Where demand by, and refusal to agent, sufficient to enable principal to maintain trover, 343.

Demand of debt by a known clerk of creditor, sufficient to make an act of bankruptcy, 343.

Where refusal on the ground of not being satisfied of the authority is justifiable, 347.

Where not, *ib.*

Where authority required to be produced at the time of making the demand, *ib.*

DEPUTY.

Of public officer, when personally liable, 396, n. (a), 398, n. (h).

DETERMINATION OF AUTHORITY.

See Authority.

Authority implied from employment, where it continues after employment, ceases, 170, 188.

Authority determined by death of principal, 185, 186.

by revocation. *See Revocation, Power of Attorney.*

Authority of agent for sale ceases with the sale, therefore auctioneer after sale has no authority to treat about title, 188.

Authority of broker countermandable at any time before a memorandum of the sale is signed by him, 185.

Insurance broker's authority may be revoked before the policy is subscribed, notwithstanding the slip is signed, and the broker is in honor bound to pay the premiums, *ib.*

DISBURSEMENTS.

What agent entitled to charge, 107, 108, &c. *See Allowance.*

Urgent circumstances may justify disbursements otherwise unauthorized, 109.

Mere voluntary disbursements not allowed to be charged, *ib.*

Agent forfeits his commission if, through his negligence or unskillfulness, no benefit accrue to his employer, 105.

So if he depart from his character of agent for his employer, and act adversely to him in any part of the transaction, *ib.*

Broker, on refusal of principal to pay money on a contract negotiated by him, paying it for his own credit, cannot charge principal with it, 109.

Though the latter might have been compelled to pay, 110.

Aliter, if the agent either by stipulation or custom is guarantee for the payment, *ib.*

Broker, under ordinary commission, pays loss for underwriter, this is a voluntary payment, and cannot be charged, 111.

Not allowed expenses and disbursements occasioned by his own ignorance or unskillfulness, 105, 116.

Advances made in the course of *illegal* transaction not allowed, 116.

Disbursements made after notice of principal's bankruptcy not allowed, 121, *See Bankruptcy.*

In action against agent he may give in evidence disbursements, &c. without set-off, 124.

DISTRESS.

Goods of the principal cannot be distrained for factor's rent, 96.

DUTIES.

See Customs.

EMBEZZLEMENT.

Money fraudulently embezzled by servant, and applied to unlawful purpose, may be recovered from a *particeps criminis* if it can be traced, 63.

EQUITY.

Will make agent account for profits obtained by clandestinely selling his own goods to his principal, 38.

Where court of equity will avoid grants made to agents, 11, 12.

Where bill in equity is the proper form of proceeding against agent, 59.

Where principal may proceed either by action or by bill, 60.

Where, notwithstanding settled accounts and release, a court of equity will open the account, 52, 292.

EVIDENCE.

Verbal acknowledgment of authority under seal, not sufficient proof of it, but the authority itself must be produced, 158.

But, in an action on a policy of insurance subscribed by an agent acting under a power of attorney, it is sufficient to prove the authority to show that the principal is in the habit of paying losses on policies so subscribed, 310.

Where declarations and admissions of agent evidence against principal, 268, 269.

Distinction between such as form part of contract, and such as to go to the proof of particular facts, 268, 269.

If any material fact rest in the knowledge of an agent, it must be proved by his testimony, not by his mere assertion, 270.

Admission of agent that a bond was in the hands of principal, not evidence against the latter, 269.

The doctrine fully discussed in the case of *Farlie v. Hastings*, *ib.* 272.

Letters of an agent abroad to his principal, containing a narrative of the transactions in which he has been employed, not admissible in evidence against the principal, 270, n. (1).

General rule on this subject stated, *ib.*

Quære, whether acknowledgment by agent of receipt of goods admissible against principal, 271.

On a question on sale of bark which party was to supply bags, letter of agent after the contract not admitted, 272.

Aliter, if it had been contemporary with contract, *ib.*

But letter written by a clerk employed to correspond may be evidence, as supposed to be written under inspection of principal, *ib.*

Brokers acting for undisclosed principals are not authorized to receive payment in a manner varying with the original contract, and evidence of usage sanctioning such an alteration is not admissible, 280.

How authority to be proved, 309.

If in writing, or such as from its nature must be in writing, that must be produced, *ib.*

In other cases it is sufficient to prove the agent's usually acting in that capacity with knowledge of the principal, 310.

In an action on policy where sufficient to prove the signature by a person usually employed to sign policies, by defendant, 310, 311.

But there must be some evidence of former acts having been recognized by the principal, 311.

Subsequent assent supplies evidence of previous authority, 171, 312.

In action charging the master with negligence in driving, evidence that the servant drove, sufficient, 309.

Declaration on a bill of exchange stating defendant's indorsement, "his own proper hand being thereunto subscribed," satisfied by proof of indorsement by agent, 308, n. (1).

So bill accepted by agent may be stated to have been accepted by principal. *ib.*

Where agent is a witness, 318. See *Witness*.

EXECUTION OF AUTHORITY.

See *Authority*.

Must be executed by the person to whom it is given, 175.

Authority given to A. to sign an agreement for a lease not well executed by an agreement signed by his clerk, although approved of by A. and done in the usual course of his business, 176, n. (1).

Authority to two cannot be executed by one, 177.

Authority to three jointly and separately not well executed by two, 177.

Particular authority must be strictly pursued, 178.

Authority to do an act upon condition, if done absolutely, void, 179.

Acts done under power of attorney must be done in the name of principal, 180.

Execution of deed under power of attorney, if done in the name of the attorney only, void as to principal, 181.

So a release in attorney's name, *ib.* 291.

"For A. B. (the principal,) C. D. (the attorney,)" sufficient execution of the deed, 182.

But the form of the deed itself must be in the name of principal, otherwise no interest passes, *ib.* 183.

Submission to arbitration by one, "as attorney to A. B.," conditioned that the obligor should perform award, held the principal not bound, 183, 291.

Execution as to time, 185.

Must be during life of principal, *ib.* See *Determination of Authority*.

FACTOR.

Description of, 13.

Difference between factor and broker, *ib.* App. 4.

How far responsible for the safe preservation of goods intrusted to him, 14, 15, 16.

Duty to insure, 18, See *Insurance*.

To discharge customs, duties, &c. on exports and imports, 23, 24. See *Customs*.

Where factor may sell on credit, 26, 212. See *Credit, Sale*.

Where liable for loss by payment in bad money, 28.

- Factor employed to purchase cannot be himself the seller, 37.
- Factor clandestinely dealing with principal as merchant by selling his own goods, liable to refund all but prime cost, *ib.* 38.
- Factor having *del credere* commission to what extent liable. See *Del Credere*.
- Where responsible for loss by failure of third persons, 45, 46, &c.
- Joint factors liable for each other's receipts, 52.
- Joint consignment makes each liable, 53.
- Agreement to share commissions makes the parties joint agents and liable for each other, *ib.*
- If goods consigned to two for sale upon commission be, with the consignor's assent, assumed by one, who sells them, money had and received lies against him alone, 53, n. (w).
- Discharge of one joint factor releases the other, 53.
- Survivor of two joint factors must account for himself and deceased partner, *ib.*
- Bankruptcy of factor. See *Bankrupt*.
- Death of factor. See *Death*.
- Right to commission. See *Commission*.
- Right to allowance for advances, disbursements, &c. See *Allowance, Disbursements*.
- Factor paying bills after notice of principal's bankruptcy, but which had been accepted before, protected by 1 Jac. I, 121, 122.
- What payments protected after bankruptcy of principal. See *Bankruptcy*.
- Factor's lien on goods, &c. See *Lien*.
- Factor's lien on proceeds of goods sold, 147.
- Factor having general power to sell or purchase, binds principal, though in a particular instance, the sale or purchase not according to instructions, 207.
- Aliter*, of one specially employed, 208.
- Sale by factor, 211. See *Sale*.
- Factor cannot barter, 213, &c.
- Where he can pledge. See *Factor's Act, Pledge*.
- Factor's regular authority is by bill of lading, but in some cases letter of advice sufficient, 240.
- Factor's power to bind principal for freight. See *Freight*.
- Factor entering into charter-party in his own name, personally liable, 381.
- Aliter*, if he load aboard generally, *ib.*
- Payment to factor where it discharges the debtor, 278.
- In general payment to factor, without notice to the contrary, is a discharge ; but after notice not, *ib.*
- Whether he receive a *del credere* commission or not, 111, n. (3).
- Cases in which payment to factor good, even after notice from principal not to pay, 285, 286.
- As in case of factor *del credere* selling at his own risk, *ib.*
- But now held that a commission *del credere* makes no difference, 286.

So where factor is in advance and has a lien upon the price of the goods sold, 287.

Where notice of the lien is not given to the buyer, payment by him to the principal is good, 325, n. (3), 362.

But the *onus* of proving that fact lies upon the debtor, 288.

If the principal allow the agent to appear as principal, and he only is known to the buyer, payment to him sufficient, *ib.*

To entitle principal to payment after notice, a privity between himself and agent must be shown, 58, 150, 285.

Factor witness to prove his contract, 318, &c.

Where vendor may set-off a debt due from the factor to himself against the demand of the principal, 325. See *Set-off, Vendee*.

Right of factor to enforce payment to himself in opposition to the principal, 364.

Viz. where he has a lien on the goods sold, *ib.*

So a factor *del credere*, 366.

Has an insurable interest in the goods consigned to him, 100, n. (a).

FACTOR'S ACT.

Summary of the law with respect to the agent's right of pledging as it existed before the passing of the Factor's Act, 218, 222.

Analysis of the act, 222, 226.

Policy of certain clauses considered, 226, 227.

Cases decided upon factor's act, 227, 233.

FRAUD.

Agent not bound to obey instructions if they lead to a fraud, 8. See *Sale*.

Broker really engaged as principal, but acting ostensibly as broker, guilty of gross fraud, 14, n. (2).

Principal entitled to profits made by agent fraudulently trading with his property, 51.

Principal how far responsible for fraud of agent, 301, &c.

Where liable for frauds committed in his employment, though without his knowledge or authority, 302.

Action for deceit in the sale of silk, principal held liable, though the deceit was in his factor abroad, *ib.*

Principal never criminally answerable without special command, 303.

Principal cannot avail himself of a fraudulent contract made by his agent, 325.

FRAUDS, STATUTE OF.

Where the authority of an agent within the statute must be in writing, and where it need not be in writing, 158, 159.

What description of agent sufficient to satisfy the statute which requires agreements to be signed by the party or his agent, 313.

Auctioneer agent for both parties, in the sale of personal, but not of real property, *ib.*

Since determined that an auctioneer is an agent for the purchaser of real property, 314, n. (2).

But the auctioneer's clerk, notwithstanding any usage, is not an agent within the statute, without special authority, 316.

Broker where agent for both parties, so that a sale-note signed by him sufficient to bind both buyer and seller, 315.

Memorandum signed "witness A. B. agent for the seller," sufficient within the statute, 317.

FREIGHT.

Factor's power to bind principal, or goods for freight, 241.

Factor entering into charter-party in his own name personally liable, 381.

***Aliter*, if he load aboard generally, *ib.* 373.**

Agent indorsee of bill of lading which directs delivery of goods to order or to assigns paying freight, liable for freight, although proceeds paid over to his employer before freight demanded, 373.

***Aliter*, where goods are delivered not on bill of lading, but on an express order of principal, 374.**

GOVERNMENT AGENT.

Not generally personally liable, 376.

HUSBAND AND WIFE.

See Wife.

ILLEGAL TRANSACTION.

No defence to action against agent for money received to be paid over to principal, 62.

Unless where the cause of action cannot be brought before the court, but through the medium of the illegal contract, 64.

As long as money paid to agent on illegal transactions remains unemployed, or after countermand, it is a debt which may be recovered by action, 66.

But not after it has been applied, *ib.*

Advances made by agent in the course of illegal transaction not recoverable, nor allowed in account, 116.

Consideration of bill was differences of stock paid by broker for principal on stock-jobbing transactions: held that broker could not recover on it, 117.

So when consideration was premiums paid on illegal insurance, *ib.*

No difference between *mala prohibita* and *mala in se*, 120, 121.

INSTRUCTIONS.

Agent's duty to obey instructions, 3.

Cannot derive benefit from disobeying them, *ib.*

Though liable to the risk, *ib.*

Not bound to obey them if fraud be the consequence, 8.

Third party not affected by private instructions to agent, 201. See *Sale*.

INSURANCE.

When factor or agent bound to insure property of principal, 18.

Where agent justified in insuring without authority, 108.

If he neglect to insure when it was his duty to do so, he is himself in place of an insurer, 18.

So if he make an ineffectual insurance, 19.

Must take care to have the usual clauses inserted in the policy, 18.

Gratuitous promise to insure does not make promiser liable if he neglect, 19.

In action for not insuring, agent may avail himself of any defence which an underwriter might have had, *ib*.

As the want of interest, deviation, &c. 20.

Or the illegality of the voyage, though in fact similar assurances be common, and would probably have been paid by an underwriter, *ib*. 76.

In action for not making effectual insurance by reason of a concealment, the agent may show that if the fact had been communicated no insurance could have been made at the limited premium, 20.

It is sufficient if he do all that is usual to get the insurance effected, 21.

If the principal desire to insure at any particular office, it must be expressed in the instructions, otherwise it is sufficient if done at any reputable office, *ib*.

Though greater advantage might be obtained at some other, 22.

Policy, where it may be in the name of agent, *ib*.

Action on policy. See *Policy*.

Policy when effected the property of principal, 23.

In trover against an agent for a policy, he having represented to the principal that he had effected one, it was taken to exist, though none in reality had been made, *ib*.

Insurance brokers have a lien on policies for their general balance, 130.

Broker employed to effect insurance has authority to adjust losses, 191.

So broker employed to settle losses has authority to refer a dispute about a loss to arbitration, *ib*.

Effect of broker's representations, 257.

Effect of concealment by broker or intermediate agent employed in effecting insurance, 257.

To affect the policy, the representation must be at the time of underwriter's subscribing, or of putting his name on the slip, 261. A consignee or factor has an insurable interest in the goods consigned, 100, n. (a).

But not a supercargo, *ib*. See *Policy*.

INTEREST.

Principal where entitled to interest upon money in agent's hands, 49.

Where not, 50.

INTERPLEADER.

If agent can sustain bill of, 10, n. (k).

JOINT AGENTS.

When all must unite in executing authority, 177.

When one liable for the other, 52, 53.

LIEN.

Definition of, 127.

General and particular, *ib.*

General lien must arise from contract or special custom, *ib.*

Factor has a general lien upon goods for advances, &c. 128.

Likewise upon securities and the proceeds of goods sold, 129.

But he has no lien on a security, delivered to him for a particular purpose, 142.

The security must be received in the ordinary course, and not by misrepresentation, 129.

Packers entitled to general lien, 130.

Insurance brokers have a lien upon policies for general balance, *ib.*

And so have they for a policy effected *without notice* that it is not on account of the person for whom they receive the order, 150.

Of attorney or solicitor, 131, n. (A).

What description of persons entitled to a lien for a general balance, 130, *ib.* and n. (B).

Bankers entitled to general lien, 131.

But they have no lien on securities on which they have refused to advance money, *ib.*

And if securities have been deposited for a specific sum the lien does not extend beyond that sum, 131.

Where banker has a lien on securities, his assignees, in the event of his bankruptcy, may sue the parties to them, *ib.*

For what things lien may be claimed, 132.

Debt for which lien exists must be in agent's own right, *ib.*

And due from his employer. *ib.*

Not acquired by voluntarily paying principal's debt, *ib.*

A broker without the knowledge of principal making himself responsible to the seller has no lien on the goods purchased for the money he may pay, 134.

Unless where the agent is surety for the debt, *ib.*

Quære, whether a lien exists for a debt incurred previous to the commencement of employment as factor, *ib.* 135.

Under what circumstances lien takes place, 137, &c.

The goods must have been in factor's possession, *ib.*

Accepting bills on faith of consignment not sufficient, 138.

No lien where the goods come into factor's possession not by consignment of the principal but by some other means, 139.

Lien may be prevented by the terms of the agreement, 140.

As by a receipt promising to be accountable for proceeds, *ib.*

Lien how lost, 142.

By parting with possession to principal or his order, *ib.* 143.

But foreign factor procuring goods on his own credit, may stop them in *transitu* after a consignment to his principal, 144.

Goods once parted with and returning into factor's possession in the course of dealing, lien revives, 145.

Factor depositing goods with his own agent to keep for him does not lose his lien, 145, 217.

Factor selling goods on which he has a lien retains his right upon the proceeds, 147.

And may enforce the payment to himself in opposition to the principal, 364.

Sub-agent with notice has no lien for a debt due from his immediate employer, 147. See *Broker*.

Lost by agent pledging the property, and not transferred to pledgee, 216. See *Pledge*.

Broker, with whom goods have been deposited by agent, consignee paying duties, &c. has a lien in his own right not derived from agent, 217. See *quare*, see *ib.* n. (5).

Promise by third person to pay the amount of lien in consideration of agent's parting with the goods sufficient to support an action, 366.

LOSS.

Factor or other agent not liable for loss by fire, robbery, or other accident not happening by his default, 16, 17.

Where agent liable for loss on payment from the badness or depreciation of money, 28.

If factor buy goods which turn out to have been damaged, how the loss is to be apportioned, 32.

Not liable where subsequently damaged, *ib.*

Not answerable for loss by the failure of persons in whose hands he has placed his principal's money in the usual course of business, 45.

Nor by the dishonor of bills taken in the usual course of business, *ib.*

Liable for loss occasioned by any unauthorized disposition of the principal's money, 47.

Goods sent to a particular place to be sold, if agent carry them elsewhere, he is liable if they are lost, 3, n. (a).

MARKET OVERT.

The English law as to market overt not adopted in the United States, 218, n. (A).

MASTER AND SERVANT.

See *Servant*.

MASTER OF SHIP.

Master of ship employed on a certain voyage letting out the ship to government, at a freight, besides a per centage for himself, cannot recover his share from the owners to whom the whole has been paid, 106.

Master has no lien for money for repairs, 133, n. (x).

Master of ship has no lien on freight for wages or disbursements during the voyage, or for premiums paid abroad for procuring the cargo, *ib.*

Master witness to prove money in dispute borrowed for the use of the ship, and not for his own use, 321.

But in a question of barratry, not a witness to prove that it was with consent of owners, without a release from the underwriters, because he is liable to them, if the assured recover, *ib.* 322.

Master liable for repairs done by his order, unless expressly stipulated to the contrary, 388.

Master of a ship, though only agent of the ship owners liable to the owner of goods for negligence, 398.

Master answerable for mariners, 296.

Liability of owner of ship for acts or contract of master, 295, 296.

MEMORANDUM OF SALE.

What sufficient memorandum of agent, 314, n. (2).

Need not be written with a pen, *ib.*

NEGOTIABLE INSTRUMENTS.

In what cases the absolute right of an agent or banker to transfer negotiable instruments may be qualified, 90, n. (a).

Bank notes cannot be followed into the hands of a *bona fide* holder, 94, see *note*.

If wrongfully transferred by agent cannot be reclaimed from the holder 233. See *Banker*.

But where a bill of exchange is indorsed to agent "for account of his principal," its negotiability is restricted, 236.

Lottery tickets, stock receipts, &c. not transferable, 238, n. (u).

What instruments transferable by delivery, 234.

What not, *ib.*

Foreign instruments, *ib.*

In cases of fraud, as of embezzlement by servant, even money if it can be traced, may be followed in the hands of a *particeps criminis*, 238.

And notes, bills, &c., may be recovered by the real owner from persons who have taken them without due caution from parties who have improperly obtained them, *ib.*

When payment of a debt, 251, n. (9).

Rights of holder of, when negotiated after due, 119, n. (t), 339.

NOTICE.

Agent's duty in giving notice of contracts, &c. to principal, 38.

Giving notice of sale, 27.

Consequence of neglect or delay of giving notice, 39.

Bound to give the earliest notice of such things as make it necessary for principal to take steps for his security, 38.

Effect of notice to agent as notice to principal, 262.
in contracts of insurance, 258, &c.

Notice to agent of incumbrances on real property, where principal affected by, 263, n. (f).

Actual notice to agent constructive notice to principal, although purchase be made under the sanction of the Court of Chancery, and an infant be interested in it, 266, note.

Action for giving a false character of a person's solvency, proof that plaintiff's agent, to whom the character was given, had notice of the person's insolvency, held good defence, 263.

Notice to affect principal on contract by agent must be to one empowered to treat, not merely to carry proposals, 266.

Notice to agent not to pay over money to principal, effect of to charge agent personally, 389, n. (t).

When agent personally liable without such notice, *ib.*

NOTICE TO QUIT.

Given by agent when or not valid, 190, n. (c), 345, n. (h).

PARTNER.

Analogy between relation of partners and of principal and agent, 157, n. (l), 163, n. (3).

Joint agents liable for each other's receipts, 52.

Joint consignment makes agents partners, 53.

Agreement to share profits of commissions makes partnership, *ib.*

If goods consigned to two for sale on commission, be with the consignor's assent, assumed by one who sells them, money had and received lies against him alone, 53, n. (w).

Survivor of two joint agents must account for himself and deceased partner, 53.

How far a joint employment of one agent by several principals makes the latter jointly liable, 242.

Several employ one broker to buy a parcel of goods, but without any mutual interest, held not to be jointly liable, *ib.*

One part cannot, in general, bind the other by instrument under seal, 157, n. (l).

See exceptions to the rule, *ib.*

PAYMENT.

When principal will be liable to payment, 246.

When broker will, *ib.* 248.

When seller may choose to charge either the principal or broker, 247.

When he will be deemed to have elected, *ib.* 248.

Principal discharged by payment of broker, 250.

Where payment to known agent is good, 279.

- Where there is risk in paying broker, 289.
- When agent liable to pay money over again, 393.
- Where broker cannot bind his principal by receiving payment in any other mode than that originally stipulated, 279.
- Where he may, 280.
- Payment of freight by broker after notice not to do so cannot be recovered from principal, 109.
- Payment to agent. In what cases agent may take note of debtor instead of money, 204, 290. See *Banker, Trade*.
- Agent having general authority to receive payment may receive it in any manner authorized by the course of business, 290.
- Aliter*, of special agent, 291.
- Principal not discharged by payment to his own broker or agent, 243.
- Unless where from circumstances, credit appears to have been given to agent by vendor, *ib*.
- As by letting the day of payment go by for a considerable time, 244.
- Nothing will operate as a discharge to the principal which cannot be pleaded as payment between the creditor and the agent, 251.
- Payment to agent where it discharges debt due to principal, 274, 275, 276.
- Agent himself may prove authority to receive payment, 277.
- On written securities payment to agent not sufficient unless he has possession of the security, 274.
- Bond debtor not discharged by payment to one who had usually received the interest, if he has not possession of the bond, *ib*. 275.
- Unless by special authority, *ib*.
- Bond remaining in the hands of agent evidence of authority to receive principal and interest, *ib*.
- Except mortgage-deed, *ib*. n. (e).
- Production of bill of exchange or promissory note sufficient in general to authorize payment to holder, 276.
- Payment to factor or broker, where a discharge, 277, 335. See *Factor, Broker*.
- Payment to attorney, 277, n. (l).
- Payment under protest, 378, n. (t).

PILOT.

- Liability of owner of vessel for acts of, 296, n. (g), 301, n. (8).

PLEDGE.

- Factor cannot pledge, 213.
- So of any other agent for sale, *ib*.
- Though pledgee ignorant of agent's character, 214.
- The reasonableness of this doctrine questioned, 213, n. (d).
- Broker having bought goods in his own name, and entered them so in the king's warehouse, and having pledged them to one ignorant of his representative character, held that the pledgee had no title, 214.
- Same rule as to bill of lading, 215.

And the pledgee has no title, even where the possession and indorsement of the bill of lading is legal in the first instance, *ib.*

It makes no difference that factor has a lien on the property pledged, and is in advance to his principal, 216.

Power to sell, assign and transfer stock does not empower agent to pledge it, 218.

How far these rules apply to negotiable instruments, 233. See *Negotiable Instruments*.

The law on the right of factors to pledge stated, both as it was at common law before the passing of the Factor's Act, and as it now is under that statute, 218 to 233. And see *Factor's Act*.

Principal may maintain trover against the pledgee, 341.

No demand and refusal necessary in such action, 342.

Pledgee compelled by a court of equity to give a description of the goods, *ib.*

Not necessary to tender him the amount of the agent's lien, *ib.*

POLICY.

See *Insurance*.

Underwriter's acknowledgment on policy effected by broker of premium received, conclusive between him and principal, 253, 336.

Aliter, where a fraud has been practised upon the under-writer by a collusion between the broker and assured, 254.

Policy when effected by broker the property of principal, 23.

But subject to broker's general lien, 130, 146. See *Lien*.

Effect of broker's or agent's representation on the policy, 257.

Effect of concealment of material fact by, 260. See *Notice*.

To affect policy, misrepresentation must be at the time of subscribing that, or the slip, 251.

In action on policy signed by agent, it may be described as signed by the principal, 308.

Broker may maintain action in his own name on policy effected by him, 362.

POSTMASTER GENERAL.

Not liable for acts of deputy, 300.

POWER OF ATTORNEY.

Execution of authority under, 180, &c. See *Execution*.

Acts done under must be in the name of principal, *ib.* 292.

When revocable or not, 184.

Not revocable when part of security, 185.

Determined by death, *ib.*

Power of attorney authorizing creditor to receive a debt, unaccompanied by any assignment of it, determined by death, 186.

But power of attorney to execute indorsement of sale upon the register of a ship not determined by the bankruptcy of the principal, 187, 188.

Quære, whether an act done under power of attorney, before the attorney knows of the revocation of his authority, good, 188.

Power of attorney is determined by death, and an act done afterwards, though *bona fide*, is a nullity, 186.

Power of attorney to recover debt authorizes arrest, 191.

But power of attorney to receive all salary, &c. with authority to recover, compound and discharge, and to give releases, does not authorize the negotiating of bills, 192.

Neither does a general power to transact all business, *ib.*

When irrevocable, 185, n. (d).

PREMIUM OF INSURANCE.

Where agent entitled to charge or be allowed, 109.

Memorandum on policy effected by broker of premium received conclusive between underwriter and principal, 253, 254.

Aliter, where there is collusion between broker and assured, 254.

PRINCIPAL.

Entitled to profits made by agent upon his property, 49, 50.

An usage authorizing an agent to make a profit by a bill upon his principal cannot be supported, 49, n. (3).

On the death of one joint principal, the remedy survives, 53.

Principal not responsible to sub-agent for work done on his account, 49, 175.

How far joint employment of one broker by several principals makes the latter jointly liable, 242. See *Partner*.

Principal when discharged by credit given to agent, as by letting the day of payment elapse for a considerable time, 244, 246.

No contrivance between the principal and agent will release the former from his liability, 247, n. (3).

No private agreement between the principal and agent that the latter only shall be liable to the seller, discharges the liability of principal, 243.

How far principal responsible for wrongs committed by agent in his employment, 294, 301, 305. See *Responsibility*.

Certain public officers exempt from responsibility for their under-officers, 300.

Principal never criminally responsible without special command, 303.

Principal where responsible for trespass of agent, 305.

Principal cannot avail himself of a fraudulent contract made by his agent, 325.

What acts of, or promises to agent, enure to the benefit of principal, 323.

Principal may bring an action in his own name on sale by factor, 324.

Principal may adopt contracts made without his privity or authority, 324,

But in so doing he adopts the agency *in toto*, *ib.*

Principal when discovered liable, although not known at the time of the contract being made, 247, 249.

PROCURATION.

Authority to sign or indorse bills need not be in writing, 160, 161.

Allegation in count on bill of exchange stating party's indorsement, satisfied by proof of indorsement by agent, 308.

So a bill accepted by agent may be stated to have been accepted by principal, *ib.*

PROFITS.

**Principal entitled to profits made by agent by dealing with his property, 49.
See *Interest*.**

An usage authorizing an agent to make a profit by a bill upon his principal cannot be supported, 49, n. (3).

PROMISE.

Gratuitous promise to undertake an act does not make promisor liable for neglecting to undertake it all, 6.

Promise made to agent where the principal may maintain an action on, 323.

PUBLIC AGENT.

How differs from private as to personal liability, 376.

PUBLIC OFFICER.

How far liable for acts of inferior officer, 300. See *Sheriff*.

PURCHASE BY AGENT.

If agent employed to purchase deviate from his orders, as to price, quality or kind, or send the goods purchased to a different place from that appointed, principal may return them upon his hands, 28, 29.

Or in some cases may sell them and account with factor, as his agent, 29.

But principal must decisively reject the contract from the first, 31.

***Quære*, whether if the excess in price be counterbalanced by a saving in other respects, the principal is not bound to take to the goods, 32.**

Loss by goods purchased being damaged, on whom it falls, *ib.* See *Loss*.

Agent employed to purchase cannot be himself the seller, 33.

Agent employed to buy, dealing clandestinely as a merchant with his principal, liable to refund all but the prime cost of the goods, 37.

Merchant who in collusion with agent obtains a higher price for his goods, liable in equity as for a fraud, 38.

Factor having general power to purchase, deviates from his instructions in a particular instance, principal bound, 207.

***Aliter*, of special agent, 208.**

PURCHASER.

Discharged by paying broker if the payment be made in the usual course of trade, which is a question for the jury, 278.

Purchaser who has bought goods belonging to different owners from the same broker, and pays money on a general account to the broker, such

payment to be apportioned amongst the owners and the purchaser, liable to each for the surplus, 178, 279.

Purchaser justified in paying broker in a different manner from that stipulated for by the contract, where principal is not disclosed, 280.

Sed quære, ib.

Aliter, where principal is known, *ib.*

Before intervention of principal, agent a good petitioning creditor against purchaser, 361, n. (1).

Where broker sells goods without disclosing principal, purchaser cannot set off debt due from broker against principal's demand for goods, 331.

RATIFICATION.

By principal of unauthorized act of agent, 171, n. (o).

To make ratification valid, agency must have existed at time of act ratified, 345, n. (h), 387, n. (13).

RECEIPT.

Where receipt given to agent by a creditor without having received the money discharges the principal, 252.

Underwriter's acknowledgment on policy of premium received, conclusive in action by principal for return of any premium, though in fact the premium paid but a running account between the broker and underwriter, 335.

Aliter, where a fraud has been practiced upon the underwriter by a collusion between the broker and assured, 254.

Receipt given by agent to a debtor without actual payment, does not bar the principal, 292.

Unless it be a release by deed by an agent authorized under seal, 292, n. (m).

RELEASE.

What is technically, 53.

Release of one joint debtor, effect of, *ib.*

Authority of agent to release debts, 290. See *Debt*.

Release by deed by an agent authorized under seal to give releases binds the principal, though no money actually paid, 292, n. (m).

Release under power of attorney must be in the name of principal, 291, 292.

REPRESENTATIONS OF AGENT.

See *Declarations, Admissions*.

RESPONSIBILITY.

See *Action on the Case*.

For what things agent responsible generally, 3, &c.

Responsibility of gratuitous agent, 6.

Amount of responsibility, 7.

To make the agent responsible damage must be real, not probable or supposed, *ib.* 74. See *Action*.

Not responsible for disobeying instructions, if fraud would be the consequence, 8. See *Sale*.

Responsible for loss happening by previous neglect, though not the immediate fault of the agent, 10.

As where goods lost by fire in a place where they ought not to have been left, *ib.*

How far responsible for safety of goods committed to him, 15, 16. See *Factor*, *Loss*.

Not responsible for failure of banker in whose hands he has placed the principal's money, 45.

Rule of the civil law on this subject, 46, n. (4).

Nor where bills taken in payment are afterwards dishonored, 45.

But agent placing his principal's money at his banker's on his own account, is liable if the banker fail, 46.

Responsible for loss occasioned by any unauthorized disposition of principal's money, 47.

Agent responsible to principal for any loss occasioned by a deviation from authority, 3, n. (a).

Broker employed to sell goods, selling them for a bill at a given date, and drawing himself on the buyer for the amount, answerable on the bill to his principal, 43, 380.

So a factor, who on selling goods takes a security payable to himself from the purchaser, and gives his own security to the principal for the net proceeds, without disclosing the name of the purchaser, cannot, if the latter become insolvent, compel the principal to refund the money received by him, 43.

Responsibility of principal to agent for fraud practiced on agent, or for trespasses committed by agent at the request of principal. See *Action on the Case*.

Principal's responsibility for wrongs of agent, 294.

Responsibility of first employer reaches to all subordinate agents, 296. See *Action on the Case*.

But confined to acts done within the scope of the employment, 298, 306.

Landlord of house under lease, liable for negligence of workmen employed under his superintendence, 296, n. (2).

Agent not responsible for the acts of the sub-agent, 402.

Exception in favor of certain public officers, 300.

RESTS.

In calculating interest, 50, n. (k).

REVOCATION OF AUTHORITY.

Express, 184, 185, 189, n. (7).

Where authority has been partially executed, 185, n. (3).

Where notice of revocation should be given, 188, n. (1).

Implied, by death of principal, 185, 186, n. (5), or agent, 185, n. (7).

By marriage of principal or agent 189, n. (7).

Other ways by which an authority may be determined, *ib.* See *Determination of Authority, Power of Attorney.*

SALE.

Agent employed to sell to the highest bidder, with private instructions not to sell under a certain price, not liable for selling under that price, because the instructions were a fraud upon the bidders, 8.

But cannot in general sell for less than limited price, 26.

Where an agent may sell upon credit, *ib.* 212.

Where not, 212.

Depends upon the usage of trade, *ib.* See *Factor, Credit.*

Agent employed to sell cannot be himself the purchaser, except under very special circumstances, 33, &c.

Where a court of equity in such case will reopen the sale, 36.

Where agent employed to sell may warrant, 203.

Factor generally employed to sell with discretionary power, sells for less in a particular instance than directed, principal bound by the sale, 207, &c.

Aliter, of special agent, 208.

Sale by factor, 211.

Factor whose ordinary business it is to sell, has implied authority to sell goods of which the principal allows him to assume the apparent right of disposing, 167.

But sale must be absolute, 214.

On a sale under written particulars, declarations of auctioneer at the sale not allowed to be proved, 257.

Quære, if not admissible where personal information is given to the purchaser of a mistake in the particulars, *ib.* n. (3).

Sale by auction. See *Auctioneer.*

Sale note of broker. See *Broker.*

SALESMAN.

Cannot be himself a buyer, by 31 Geo. II. c. 40, s. 11, 33, n. (h).

Buyer cannot set off a debt due to himself from the salesman against the demand of the principal, notwithstanding any custom, 333.

SECURITY.

Payment of debt due on written securities, 274. See *Payment, Bond.*

SERVANT.

Servant taking up goods on credit, where master liable, though he has given money to servant to pay, 161 to 170.

One previous instance of permitting servant to buy on credit held sufficient to bind principal in a second instance, *sed qu.* 162.

- Tradesmen dealing with servant on credit, without previous sanction by master, cannot resort to the latter, 164.
- Or if he suffer the servant to run a long arrear contrary to previous mode of dealing, 165.
- Master not liable who always gives servant money in advance, *ib.*
- When servant, after being discharged, makes master liable by taking up goods in his name, 170.
- Warranty by servant, 197.
- Distinction between servant usually employed to sell and one *specially* employed without authority to warrant, 203. See *Warranty*.
- Where master liable for tortious acts of servant, 294, &c. See *Action on the Case, Responsibility*.
- What is a conversion by servant to charge the master in trover, 305. See *Trover*.
- What acts of servant make the employer a trespasser, 306.
- For what frauds of servant the master is liable, 398. See *Fraud*.
- In action charging master with negligence in driving, evidence that servant drove, sufficient, 309.
- Servant witness for master in action for money fraudulently transferred by him, 339, 359.
- When personally liable on his engagement, 378.
- How far personally liable for acts done under master's command, 398.
- Liable in trover for conversion by the master's command and for his use, 399, 400, n. (1).
- If guilty of excess in the execution of a lawful command, personally liable, 402.
- Right of master to servant's earnings, 339.

SET-OFF.

- A factor or broker cannot set off a payment made by him after death or bankruptcy of principal against his representatives or assignees, 113, see *note*.
- In action by principal against agent, not necessary for the latter to plead allowances by way of set-off, as only the balance can be recovered, 62, 124, 126, n. (10).
- Where a factor sells goods in his own name, and to one ignorant of his representative character, the buyer may, in the absence of collusion, set off a debt due to himself from the factor against the demand of the principal, 326.
- But circumstances showing collusion, or knowledge of the factor's representative character, will prevent this right, 330, *App. 4*.
- Broker may presume person from whom he receives orders to be principal, and after notice that he is not so may apply money received to pay his own balance, 150, 151.
- So if, at any time before the contract is complete, he comes to the knowledge of the factor's character, 331.
- Not sufficient to defeat the right of set-off that the vendee knows the factor

to be such by profession, unless he has notice of his being so in the particular instance, *ib.*

SHERIFF.

Liability for acts of deputy, 300, n. (o), 396, n. (d).

Personal liability of deputy, 396, n. (d).

SHIP.

Master of ship. See *Master*.

SHIP'S HUSBAND.

Duties and authority of, 109, n. (c).

When part owner may or may not be, *ib.*

One employed as husband of a ship not thereby authorized to insure, 108.

Not entitled to charge premiums paid, 109.

Unless owners acquiesce on being informed, *ib.*

SOLICITOR.

Similar to attorney at law, 1, n. (A). See *Attorney*.

STOPPAGE IN TRANSITU.

What delivery, and to what agent prevents the right of, 347 to 352.

STOCK.

Broker employed to sell cannot sell upon credit, unless specially authorized, 213.

Power to sell, assign, and transfer stock, does not empower agent to pledge, 218.

SUB-AGENT.

When agent may appoint, 17, 175.

Only accountable to immediate employer, 49.

Payment to, 278, n. (a).

Liability, 367, n. (A).

SURCHARGE AND FALSIFY.

Meaning of the term, 52, n. (g).

SURETY.

Surety for good behavior of agent, 70.

Extent of liability, *ib.*

Discharge, *ib.*

Action against, *ib.*

TENDER.

Wherever payment to an agent would be sufficient, a tender to him has the same effect as to principal, 289.

Tender by agent without actual payment does not extinguish the debt, *ib.* n. (21).

TORT.

See *Action on the Case, Responsibility.*

TRADE.

Agent bound to pursue the usual course of trade, 4.
Bound to know the usages of the trade in which his employment is, *ib.*
Exonerated from responsibility by following the course of trade, 9, 45.
As by receiving a check of debtor instead of money, 204, 290. See *Banker.*

TRESPASS.

Principal where liable in trespass for the acts of his agent or servant, 305.
Not liable for wilful trespass of servant, 306.

TROVER.

Where trover lies by principal against agent, 78.
In case of wrongful disposition of property, *ib.*
On demand and refusal, 79.
Mere non-delivery according to direction, or refusal to account for proceeds, not sufficient, 79.
Agent not being able to sell goods delivers them to his own agent for that purpose, not a conversion, 79.
Demand and refusal not sufficient, except where the property is in agent's possession at the time, *ib.*
Trover does not lie against a broker who sells at an inferior price to that at which he is directed to sell, 80, n. (2).
Refusal from *bona fide* apprehension of adverse claims, where justified, 80, 151.
In case of agent's bankruptcy, amount of goods, &c. in specie recoverable in trover, 86. See *Bankruptcy.*
Where agent has a right to retain for advances, &c. See *Lien.*
Where delivery to agent sufficient to charge principal in trover, 293.
What acts of agent amount to a conversion to charge the principal, 305.
Where trover lies by principal against one to whom goods, &c. have been wrongfully transferred by agent, 340.
As by pledge, or sale upon credit, not warranted by custom, &c. 341. See *Pledge.*
No demand and refusal necessary, 342.
Where demand by, and refusal to agent, sufficient to enable principal to maintain trover, 343.
Must be by agent authorized at the time, 345.
And the person to whom the demand is made has a right to be satisfied of the authority, if he object on that specific ground, 347.
An agent may maintain trover in his own name, 363.

But his right to recover must depend upon the title of his principal, *ib.* n. (3).
Quære, whether for goods consigned to him but never in his possession, 363.
 Servant personally liable for conversion, though by master's command, 399.

TRUSTEES.

Trustees for sale cannot purchase, 34, n. (m).
 It makes no difference that the sale was at auction, *ib.*
 Can derive no collateral advantage from management of trust, *ib.*
 The same rule applies to agents, *ib.*
 Agent considered as trustee for principal of property bought with his money,
 51.

UNDERWRITER.

See Policy, Insurance.

In action by the assured against underwriter for return of premium, the memorandum on the policy of "premium received," is conclusive, though in fact no money was paid, but a running account kept between the broker and underwriter, 335.

Aliter, where a fraud has been practised upon the underwriter by a collusion between the broker and the assured, 254.

VENDEE.

Where vendee may set off a debt due to himself from the factor against the demand of principal, 325. *See Set-off.*

By what payment to broker discharged. *See Purchaser.*

VENDOR.

See Creditor.

WAIVER.

Of remedy by factor against principal, 127, n. (A), 367, n. (A).

WARRANTY.

Where agent or servant employed to sell may warrant, 197.

Servant employed to sell a horse may warrant, unless expressly restricted, *ib.*

Difference between general and special agent in this respect, 199, 210.

Warranty on sale, to bind principal, must be at the time of sale, 256.

If the bargain is not completed at the time of warranty for want of price fixed, the warranty not binding, though the sale completed afterwards, 257. *See Declarations, Insurance.*

Agent or servant warranting, if authorized, not personally liable, 385.

Unless he engage himself personally, *ib.*

Aliter, if he warrant without authority, 386.

WIFE.

Implied authority of, to act as agent for her husband, 163.

Admission of wife, who alone transacts husband's business, binding on the latter, 164, n.

Wife contracting after revocation of authority by death of husband, 395, n. (17).

WITNESS.

Who competent from necessity, 319, n. (c), 359, 360, n. (2).

Agent may be a witness to prove his authority, 277.

Agent witness against principal, 318.

To charge one with the receipt of money, the servant who received it is a witness, 318.

Agent himself is a witness to prove his own authority to receive money, &c. 319.

Unless the authority were in writing, which must be produced, 309.

Thus also the master of a ship held a good witness to prove that money in dispute was borrowed for the use of the ship, and not for his own use, 321.

No agent, however confidentially employed, is privileged from giving evidence, except counsel and attorneys, 322.

In action by master to recover back money embezzled by servant, and employed in unlawful insurance of lottery tickets, the servant, admitted as a witness for plaintiff after a release from him, 337.

So in trover for goods tortiously transferred by servant, 360.

Quære, if release necessary, *ib.*

Agent witness on behalf of principal to prove contract, 358.

Though he has a per centage on the price, *ib.*

But where he has entered into contract in his own name, not witness to prove that he acted as agent, 359, n. (1).

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